

United States
Circuit Court of Appeals

For the Ninth Circuit.

K. V. KRUSE and R. BANKS, Copartners Doing
Business Under the Firm Name of "KRUSE
& BANKS SHIPBUILDING COMPANY," a
Corporation, on Behalf of Themselves and
Their Underwriters,

Appellants,

vs.

M. J. SAVAGE, EDW. J. MORSE, JAMES H.
HARDY, INC., JAMES H. HARDY, HANS
MICHELSON, Mrs. F. RULFS and Dr.
ALEXANDER WARNER, Claimants of the
American Steamer "HARDY," Her Tackle,
Apparel and Furniture,

Appellees.

Apostles.

Upon Appeal from the United States District Court for
the Northern District of California,
First Division.

Filed

JUL 23 1915

United States
Circuit Court of Appeals

For the Ninth Circuit.

K. V. KRUSE and R. BANKS, Copartners Doing
Business Under the Firm Name of "KRUSE
& BANKS SHIPBUILDING COMPANY," a
Corporation, on Behalf of Themselves and
Their Underwriters,

Appellants,

vs.

M. J. SAVAGE, EDW. J. MORSER, JAMES H.
HARDY, INC., JAMES H. HARDY, HANS
MICHELSON, Mrs. F. RULFS and Dr.
ALEXANDER WARNER, Claimants of the
American Steamer "HARDY," Her Tackle,
Apparel and Furniture,

Appellees.

Apostles.

Upon Appeal from the United States District Court for
the Northern District of California,
First Division.

INDEX TO THE PRINTED TRANSCRIPT OF
RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

	Page
Answers to Interrogatories Propounded by Libelants.....	20
Answers to Interrogatories Propounded by Libelants, Answer to Libel, and.....	16
Answer to Libel and Answers to Interrogatories Propounded by Libelants.....	16
Assignment of Errors.....	174
Certificate of U. S. Commissioner to Deposition of Richard C. Brennan.....	61
Certificate of Clerk U. S. District Court to Apostles on Appeal.....	178
Conclusions and Order That Decree be Entered in Favor of Respondent.....	170
Decree, Final.....	172
DEPOSITIONS ON BEHALF OF LIBEL- ANTS:	
BANKS, ROBERT	67
Cross-examination	73
Redirect Examination.....	80
Recalled.....	163

Index.	Page
DEPOSITIONS ON BEHALF OF LIBEL- ANTS—Continued:	
BRENNAN, RICHARD C.	50
Cross-examination	53
Redirect Examination	59
Recross-examination	60
BRITT, O. P.	24
Cross-examination	28
Redirect Examination	30
Recross-examination	30
CHRISTENSEN, L. H.	31
Cross-examination	32
Redirect Examination	35
DAVENPORT, J. E.	86
Cross-examination	91
DUNSON, J.	36
KRUSE, K. V.	38
Cross-examination	40
MICHAELSEN, HANS	103
Cross-examination	116
Redirect Examination	141
PETERSON, HENRY C.	65
Cross-examination	67
PILLSBURY, A. F.	92
Cross-examination	97
Redirect Examination	102
Recross-examination	102
ROSENTHAL, LOUIS	81
Cross-examination	85
Redirect Examination	86

Index.	Page
DEPOSITIONS ON BEHALF OF LIBELLEES:	
FALKENSTEIN, L. F.	42
Cross-examination	44
Redirect Examination	45
SIMPSON, EDGAR M.	46
Cross-examination	47
Redirect Examination.	48
Depositions Taken Before U. S. Commissioner, Krull.	49
Designation of Parts of Record to be Printed, Appellants'	1
Final Decree.	172
Interrogatories, Libel in Rem and.	9
Interrogatories Propounded to the Libellee and Claimant Herein.	13
Libel in Rem.	9
Minutes, March 5, 1915, as to Filing of Opinion etc.	170
Minutes of Hearing—June 2, 1914.	168
Minutes of Proclamation.	16
Notice of Appeal.	173
Notice of Filing Apostles on Appeal and Appel- lants' Designation of Parts of Record to be Printed.	1
Order Directing That Original Exhibits be Sent to Appellate Court, etc.	177
Order That Decree be Entered in Favor of Re- spondent.	170
Order That Decree be Entered in Favor of Re- spondent, Conclusions and.	170
Praecipe for Transcript on Appeal.	4

Index.	Page
Proceedings Had June 2, 1914.....	63
Proclamation, Minutes of.....	16
Recital as to Libelant's Exhibit No. 1.....	49
Statement of Clerk U. S. District Court.....	5
Stipulation and Order for Sending up Original Exhibits.....	177
Stipulation and Order Waiving Printing of Original Exhibits.....	3
Stipulation as to Testimony of Arthur Self.....	22
Testimony Taken in Open Court.....	63
TESTIMONY ON BEHALF OF RESPOND- ENT:	
HULTGREEN, A.	142
Cross-examination	148
KNUDSON, K.	154
Cross-examination	157
PREEGEN, HENRY.....	159
SANNE, RUDOLPH	161
Cross-examination	162

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

No. 2618.

K. V. KRUSE and R. BANKS, Copartners, etc.,
Appellants,

vs.

M. J. SAVAGE, EDW. J. MORSER et al.,
Appellees.

**Notice of Filing Apostles on Appeal and
Appellants' Designation of Parts of Record to
be Printed.**

To the Appellees in the Above-entitled Cause and W.
S. Andrews, Their Proctor:

Please take notice that Apostles on Appeal in the
above-entitled cause were filed in the above-entitled
court on the 29th day of June, 1915.

You are further notified that appellants intend
to rely upon all of the assignments of error in said
record and consider all of said record necessary
for the consideration of their said assignments of
error with the exception of the following pages of
the record which appellants did not consider neces-
sary to be printed in said record and desire to have
omitted from said record as printed:

1. Page 15. Claim.
2. Pages 27 and 28. Stipulation in regard to
depositions of O. P. Britt et al.
3. Page 29. Further stipulation in regard to
depositions of O. P. Britt et al.

4. Pages 55 and 56. Certificate to depositions of O. P. Britt et al.

5. Page 57. Index to depositions of O. P. Britt et al.

6. Pages 168–170, inclusive. Bond on Appeal.

7. Page 171. Notice of filing Bond on Appeal.

8. Page 174. Substitution of Attorneys.

9. All original exhibits sent up by the lower court, for the reason that said exhibits by stipulation between parties may be considered as original exhibits without being printed.

10. Omit also extended title of court and cause in all cases except on the first page and in the original libel and insert in place thereof the words “Title of Court and Cause.”

Dated July 2, 1915.

E. B. McCLANAHAN,

S. H. DERBY,

Proctors for Appellants.

[Endorsed]: No. 2618. In the United States Circuit Court of Appeals for the Ninth Circuit. K. V. Kruse and R. Banks, copartners, etc., Appellants, vs. M. J. Savage, Edw. J. Morser et al., Appellees. Notice of Filing Apostles on Appeal and Appellants' Designation of Parts of Record to be Printed. Filed Jul. 3, 1915. F. D. Monckton, Clerk.

Receipt of copy of the within Notice and Designation is hereby admitted this 2 day of July, 1915.

W. S. ANDREWS,

Proctor for Appellees.

[Title of Court and Cause.]

**Stipulation and Order Waiving Printing of
Original Exhibits.**

Whereas, the four exhibits sent up with the record in the above cause as original exhibits can best be considered by the Court in their original form; and

Whereas, it would be expensive to print said original exhibits; now, therefore,

IT IS HEREBY STIPULATED that said exhibits need not be printed, but may be considered by the Court as original exhibits, even though not printed.

Dated July 1st, 1915.

E. B. McCLANAHAN,
S. H. DERBY,

Proctors for Appellants.

W. S. ANDREWS,
Proctor for Appellees.

IT IS SO ORDERED.

WM. W. MORROW,
United States Circuit Judge.

[Indorsed]: No. 2618. United States Circuit Court of Appeals for the Ninth Circuit. K. V. Kruse and R. Banks, Copartners etc., Appellants, vs. M. J. Savage et al., Appellees. Stipulation and Order Waiving Printing of Original Exhibits and Order. Filed July 7, 1915. F. D. Monckton, Clerk.

[Title of U. S. District Court and Cause.]

Praeceptum for Transcript on Appeal.

To the Clerk of the above-entitled Court:

Please prepare transcript of record in this cause on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and include in said transcript the following:

1. Statement required by Admiralty Rule 4, Section 1, Subdivision 1, of said Circuit Court of Appeals.

2. All the pleadings, together with the exhibits annexed thereto, the same being:

(a) Libel and Interrogatories.

(b) Claim.

(c) Answer and answer to interrogatories.

3. All testimony and depositions taken in said cause including stipulation filed May 28, 1914, as to testimony of A. Self.

4. Court minutes of proceedings and orders in the above cause.

5. The opinion filed March 5, 1915.

6. Substitution of attorneys.

7. The final decree. [1*]

8. The original exhibits (4) introduced in evidence in the above cause, together with stipulation of counsel and order of Court for their transmission to Circuit Court of Appeals.

9. Notice of appeal, bond on appeal, notice of

*Page-number appearing at foot of page of Original Certified Apostles.

filing bond on appeal and assignment of errors.

10. This praecipe.

Dated June 15th, 1915.

McCLANAHAN & DERBY,

Proctors for Appellants.

[Endorsed]: Filed Jun. 15, 1915. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [2]

[Title of Court and Cause.]

Statement of Clerk U. S. District Court.

PARTIES.

Libelants: K. V. Kruse and R. Banks, copartners
doing business under the firm name
of Kruse & Banks Shipbuilding
Company, on behalf of themselves
and their underwriters.

Libellee: The American steamer "Hardy," her
tackle, apparel and furniture.

Claimants: M. J. Savage, Edw. J. Morser, James
H. Hardy, a Corp., James H. Hardy,
Hans Michelsen, Mrs. F. Rulfs and
Dr. Alexander Warner. [3]

PROCTORS.

For the Libelant: Messrs. McClanahan & Derby,
San Francisco, Cal.

For Libellee and
Claimants: Messrs. Nathan H. Frank and
Irving H. Frank, San Fran-
cisco, Cal., Original Attorneys.
W. S. Andrews, Esquire, San
Francisco, Cal., Substituted
Attorney.

PROCEEDINGS.

1913.

October 25. Filed verified Libel in Rem, for damages in the sum of \$5,000.00, and Interrogatories propounded to Libelee and Claimant.

Issued Monition for attachment of the steamer "Hardy," which said monition was, afterwards, on the 15th day of November, 1913, returned and filed with the following Return of the United States Marshal endorsed thereon: "I hereby certify and return that I received the within Writ at San Francisco on October 25, 1913, and hereby return the same without service this 15th day of November, 1913.

C. T. ELLIOTT,

United States Marshal.

By Geo. H. Burnham,

Chief Office Deputy.

San Francisco, Cal., Nov. 15/13." [4]

Filed Claim of M. J. Savage, Edw. J. Morser, James H. Hardy, a corp., James H. Hardy, Hans Michelsen, Mrs. F. Rulfs and Dr. Alexander Warner.

Filed Stipulation (bond) for release of American steamer "Hardy," in

the sum of \$6,000.00, with Massachusetts Bonding and Insurance Company, as Surety.

1914.

January 27. Filed Answer to Libel and also Answers to Interrogatories propounded by Libelant.

May 28. Filed Stipulation as to the Testimony of Libelant's witness, Arthur Self.

Filed Depositions of O. P. Britt, L. H. Christensen, J. Dunson and K. V. Kruse, for the Libelant, and L. F. Falkenstein and Edgar M. Simpson, for the Libelee and Claimants, taken before Annie Smith, Notary Public at North Bend, Oregon.

June 2. Filed Deposition of Richard C. Brennan, taken on behalf of the Libelant before Francis Krull, United States Commissioner.

This cause this day came on for hearing in the District Court of the United States, for the Northern District of California, at the City and County of San Francisco, before the Honorable M. T. Dooling, Judge, and after hearing duly had, was submitted to the Court for decision.

[5]

9. Filed one volume of testimony taken in open Court.

1915.

March 5. Filed Opinion and Order to Enter Decree in favor of Respondent.

June 7. Filed Final Decree.

15. Filed Notice of Appeal.

22. Filed Assignment of Errors.

Filed Bond on Appeal in the aggregate sum of \$500.00, with Louis Rosenthal and George Steel, as Sureties.

Filed Stipulation and Order as to the transmitting of original exhibits on appeal.

28. Filed Substitution of Attorney. [6]

In the District Court of the United States in and for the Northern District of California, First Division.

K. V. KRUSE and R. BANKS, Copartners Doing Business Under the Firm Name of KRUSE & BANKS SHIPBUILDING COMPANY, on Behalf of Themselves and Their Underwriters,

Libelants,

vs.

The American Steamer "HARDY," Her Tackle, Apparel and Furniture,

Libellee.

Libel in Rem.

(AND INTERROGATORIES.)

To the Honorable MAURICE T. DOOLING, Judge
of the District Court of the United States in and
for the Northern District of California:

The libel of K. V. Kruse and R. Banks, copartners
doing business under the firm name of Kruse &
Banks Shipbuilding Company, on behalf of them-
selves and their underwriters, against the American
steamer "Hardy," her tackle, apparel and furniture,
and against all persons intervening for their interest
therein in a cause of towage, civil and maritime, al-
leges as follows:

I.

That libelants at all times mentioned in this libel
were and now are copartners doing business under
the firm name of Kruse and Banks Shipbuilding
Company at the City of North Bend on Coos Bay in
the State of Oregon. [7]

II.

That late in the month of August, 1913, libelants
were, ever since have been and now are the owners
of a wooden barge 86 feet long and 36 feet wide,
which had just been built, and, desiring to send said
barge to the port of San Francisco for sale there,
made a verbal contract with the master of the afore-
said steamer "Hardy," whereby said steamer was to
tow said barge from said Coos Bay to said San Fran-
cisco for the sum of \$200.

III.

That in pursuance of said contract and on the 5th

day of September, 1913, said steamer "Hardy" took said barge in tow, supplying the tow rope for said purpose, and proceeded on her voyage towards said San Francisco, said barge being at said time staunch, strong and seaworthy and supplied with a proper light and all necessary equipment, and that said barge was at said time placed in the sole charge of said steamer "Hardy," no one being on board of said barge.

IV.

That by reason of the premises and under the aforesaid contract it became incumbent on said steamer "Hardy" to supply the proper ropes for the towage of said barge, and to take all reasonable and proper steps and precautions and use reasonable care to tow said barge in safety to the port of San Francisco.

V.

That on the course of said voyage, and at a point and a time which libelants are unable to specify with accuracy, the towing hawser by which said steamer "Hardy" was towing said barge parted, and said barge, with no one on board and being powerless to help herself, drifted ashore some time later near Caspar on the California coast, and it became necessary for [8] libelants to employ and pay for assistance to secure said barge and pull her off the rocks on which she had been driven and tow her to the port of San Francisco for repairs, said barge having been greatly damaged by reason of said stranding and having also greatly depreciated in value on that

account; and that said barge was thereafter duly repaired in said San Francisco, and that libelants have suffered damages in the premises in the sum of \$5,000.

VI.

That said damages were caused entirely by the negligence of said steamer “Hardy,” its master, officers and crew, and without any negligence on the part of said barge or the libelants; that libelants are at present unable to specify with accuracy all the particulars wherein said steamer “Hardy,” her master, officers and crew were negligent, but are informed and believe and on such information and belief allege that they were negligent in providing a defective rope for towing said barge, in not discovering that said barge was adrift until a long time after the breaking of said rope, in not making a diligent, sufficient or long enough search for said barge, and in allowing the light on said barge to go out and not again lighting the same, and that the damages aforesaid were due to said acts of negligence and to each of them.

VII.

That said steamer “Hardy” is an American vessel of 429 gross tonnage and 289 net tonnage, and is now within the port of San Francisco in the Northern District of California. [9]

VIII.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and this Honorable Court.

WHEREFORE, libelants pray that process of at-

tachment in due form according to the course of this Honorable Court in cases of admiralty and maritime jurisdiction may issue against the said steamer "Hardy," her tackle, apparel and furniture, and that all persons having or pretending to have any right, title or interest therein may be cited to appear and answer all and singular the matters propounded herein, and that this Honorable Court would be pleased to pronounce the damages aforesaid with interest and costs, that said steamer, her tackle, apparel and furniture may be condemned and sold to pay the same, and that libelants may have such other and further relief as shall be meet in the premises.

Dated: October 25th, 1913.

McCLANAHAN & DERBY,
Proctors for Libelants. [10]

State of California,

City and County of San Francisco,—ss.

R. Banks, being first duly sworn, on oath deposes and says: That he is one of the libelants herein.

That he has read the foregoing libel and knows the contents thereof; that the matters therein set forth are true except as to such as are stated upon information and belief, and as to these he believes them to be true.

That he makes this verification on behalf of both of the libelants herein, having due authority so to do.

R. BANKS.

Subscribed and sworn to before me this 25 day of October, 1913.

[Seal]

CHARLES EDELMAN,
Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires April 9th, 1914. [11]

**Interrogatories Propounded to the Libelee and
Claimant Herein.**

Interrogatory 1. Did the steamer "Hardy" leave Coos Bay for San Francisco on or about the 5th day of September, 1913, with a barge belonging to the libelants herein in tow?

Interrogatory 2. Who supplied the hawser used in towing said barge and how old was said hawser?

Interrogatory 3. On what day, at what hour and at what place did said barge go adrift?

Interrogatory 4. What efforts were made by the "Hardy" to locate said barge after she went adrift, and when were such efforts discontinued?

Interrogatory 5. Who was in charge of said "Hardy" when said barge went adrift, and how many men were on deck with him and in what positions?

Interrogatory 6. At what hour did the "Hardy" leave Coos Bay and on what day and at what hour did she arrive in San Francisco?

Interrogatory 7. State in detail the distance covered by the "Hardy" on her whole voyage and on each day thereof, and how many knots per hour she made each day.

Interrogatory 8. How much fuel does the "Hardy" burn on an average day's run?

Interrogatory 9. How much fuel was on board the "Hardy" at 11 A. M. on September 7th, 1913?

Interrogatory 10. Did the master of the "Hardy" make the following report after reaching San Francisco: [12]

"San Francisco, Cal., Sept. 10, 1913.

Collector of Customs,

San Francisco, California.

Dear Sir:—

I have to report:—

The S. S. 'Hardy' left Coos Bay, Oregon, on Sept. 5, 1913, about 4 P. M., bound to San Francisco with a red painted flush deck barge in tow, with no person or persons on board of barge.

When about 25 miles South Easterly of Point Gorda, distance off shore about 14 miles the tow-line parted—time 0 h. 30 m. A. M., September 7, 1913.

I immediately hove my steamer too with her head North Westerly until daylight. Daylight weather foggy.

I steamed about searching for barge, but was unable to find said barge.

8 A. M., same date, fog lifted, and I continued to search for the barge until 11 o'clock A. M., same date, and not having sufficient fuel to further delay I then proceeded on my voyage to San Francisco.

At about 6 P. M. (same date) Sunday, Sept. 7, 1913, I spoke the S. S. 'BEAVER' bound North, and informed him of loss of my tow, and asked him to send a Wireless to San Francisco.

I arrived in San Francisco, Monday, September 8, 1913, and reported to the U. S. Hydrographic Office

by telephone, and also to the owner of the barge, Mr. Davenport.

No damage to my vessel.

Respectfully submitted,

(Sg.) H. MICHELSEN,

Master S. S. 'HARDY.' "

Interrogatory 11. Is said report correct in all respects and, if not, wherein is the same incorrect?

Interrogatory 12. Did the light on the barge go out on the course of the voyage and, if so, when did it go out?

Interrogatory 13. Was the light on said barge lit again at any time thereafter?

Interrogatory 14. When the master of the "Hardy" spoke the S. S. "Beaver" on September 7th, 1913, as mentioned in the report contained in Interrogatory 10, did he not tell said S. S. "Beaver" that the barge therein mentioned had no light on her and was a menace to navigation or words to that effect? [13]

[Endorsed]: Filed Oct. 25, 1913. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [14]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Tuesday, the 11th day of November, in the year of our Lord, one thousand, nine hundred and thirteen. Present: The Honorable M. T. DOOLING, Judge.

#15,484.

K. V. KRUSE et al.,

vs.

Am. Str. "HARDY," etc.

Minutes of Proclamation.

On motion of G. Bell, Esqr., proclamation was duly made for all persons having anything to say to appear and answer the libel herein and on motion of I. Frank, Esqr., claimant was granted ten days to plead to said libel. [16]

[Title of Court and Cause.]

**Answer to Libel and Answers to Interrogatories
Propounded by Libelants.**

To the Honorable the District Court of the United States, in and for the Northern District of California, Division One.

The answer of M. J. Savage, Edw. J. Morser, James H. Hardy, Inc., James H. Hardy, Hans Michelson, Mrs. F. Rulfs and Dr. Alexander Warner, claimants herein, to the libel of K. V. Kruse and R. Banks, copartners doing business under the firm name of Kruse & Banks Shipbuilding Company, on behalf of themselves and their Underwriters, against the American steamer "Hardy," her tackle, apparel and furniture, and against all persons intervening for their interests therein, in a cause of towage, civil and maritime, alleges as follows:

I.

Answering unto paragraph I of the said libel,

claimants are ignorant of the matters and things therein set forth, so that they [17] can neither admit nor deny the same, wherefore they call for proof thereof.

II.

Answering unto paragraph II of sail libel, claimants admit that the master of the steamship "Hardy" entered into a verbal contract with R. Banks for the towage of a certain barge at some time during the month of August, 1913, but allege that in and by said contract it was agreed that the said towage was to be done at the sole risk of the owners of said barge. They further allege that no part of said \$200.00 agreed to be paid for said service has ever been paid or tendered to said claimants, or to the master or owners of said vessel.

As to the allegations that libelants were, ever since have been, and now are, the owners of the wooden barge mentioned in the libel on file herein, and that said libelants desired to send said barge to San Francisco, for sale there, claimants are ignorant of the matters so set forth, so that they can neither admit nor deny the same, wherefore, they call for proof thereof.

III.

Claimants deny that the said steamer "Hardy" furnished the tow rope for the purpose of towing the said barge, and on the contrary allege that it was in and by the contract of towage provided that the owners of said barge should provide the tow-line which was in fact provided by the said owners and fastened to the said barge under the supervision of

libelants. Claimants further deny that said barge was at any of the times mentioned in the libel, staunch, strong or seaworthy; deny that said barge was supplied with a proper light and all necessary equipment.

IV.

Deny that by reason of the premises and under the contract for towage of the said barge, or by any reason or contract whatsoever, [18] it became incumbent on the said steamer "Hardy" to supply the proper ropes for the towage of said barge, or any rope at all for said towage; and in this regard claimants allege that under the aforesaid contract for towage, it was incumbent upon the owners of said barge to supply the necessary ropes for said towage, and that the ropes used for said towage were in fact supplied by the said owners.

V.

As to the allegations in paragraph V of said libel, that said barge drifted ashore some time later near Caspar on the California coast, and that it became necessary for libelants to employ and pay for assistance to secure said barge and pull her off the rocks on which she had been driven and tow her to the port of San Francisco for repairs, or that said barge was greatly damaged, or damaged at all, or that it has greatly depreciated in value on that account, claimants are ignorant, so that they can neither admit nor deny the same, wherefore, they call for proof thereof.

Claimants deny that libelants have offered damage in the premises in the sum of Five Thousand (5,000) Dollars, or in any sum whatsoever.

VI.

Claimants further deny that the damages as in paragraph VI of the libel alleged were caused entirely, or at all, by the negligence of the steamer "Hardy," its master, officers and crew, or either of them, and deny that the same was without negligence on the part of the said barge, or the libelants.

Claimants deny that they provided a defective rope, or any rope, for the towage service to said barge, and further allege that the steamer "Hardy," her master, officers and crew, used every effort and proper diligence to pick up the said barge after she [19] broke adrift; deny that said master, officers and crew were negligent in not discovering that said barge had broken adrift, and in this respect allege that the said steamship "Hardy" had proper lookouts stationed for the purpose of observing the tow, and the said lookouts used all diligence in respect thereto. They further deny that they were negligent in allowing the lights on the barge to go out, or in not again lighting them, but in this regard they allege that said lights were furnished and placed on board said barge by libelants, and that when said lights went out it was, by reason of the condition of the sea, impossible to board said barge for the purpose of re-lighting them.

VII.

Claimants deny that all or singular the premises in said libel set forth are true, but admit the jurisdiction of this Honorable Court.

WHEREFORE, claimants pray that said libel may be dismissed and for their costs herein.

NATHAN H. FRANK,
IRVING H. FRANK,
Prctors for Libelees. [20]

City and County of San Francisco,
Northern District of California,—ss.

James H. Hardy, being duly sworn, deposes and says: I am one of the claimants in the above-entitled cause; I have read the foregoing Answer to Libel, and know the contents thereof; that the same is true of my own knowledge, except as to the matters which are therein stated upon information and belief, and that as to those matters I believe it to be true.

JAMES H. HARDY.

Subscribed and sworn to before me this 26th day of January, 1914.

[Seal] MATTHEW BRADY,
Notary Public in and for the City and County of San Francisco, State of California. [21]

**Answers to Interrogatories Propounded by
Libelants.**

Answer to Interrogatory 1. The steamer "Hardy" left Coos Bay for San Francisco on the 5th day of September, 1913, with a barge in tow. As to whether it was the property of libelants, claimants are uninformed. The barge was taken in tow at the request of Messrs. Kruse and Banks.

Answer to Interrogatory 2. Mr. Banks supplied the hawser, instructing the master of the vessel to obtain the same from Edgar Simpson. Do not know

how old the hawser was, but it was apparently a good one.

Answer to Interrogatory 3. The barge was first discovered adrift at 40 minutes past 12 on the morning of September 7, 1913, about 25 miles southeast of Point Gorda, 14 miles off shore.

Answer to Interrogatory 4. The barge was reported adrift; the vessel was hove to, the engines working dead slow, and efforts were begun to locate the barge. The efforts were continued from 12:40 A. M. until about 11:15 A. M., in all about 11 hours, when the vessel proceeded to San Francisco. The master also notified the "Beaver" of the loss of the barge, and requested them to keep a lookout for her.

Answer to Interrogatory 5. The mate, Holgren, was on the bridge at the time the barge went adrift; there was a man on the forecastle head as lookout, the quartermaster on the bridge at the wheel with the first officer and a man at the stern as lookout for the purpose of keeping watch on the barge. [22]

Answer to Interrogatory 6. The "Hardy" left Coos Bay on Friday, September 5th, 1913, at 5 P. M., and arrives alongside the wharf at San Francisco at 6 A. M. September 8, 1913.

Answer to Interrogatory 7. September 5th the "Hardy" covered 38 miles; September 6th, 179 miles; September 7th, from 12 midnight to 11:15 A. M., 48 miles, searching for the barge from 11:15 A. M. to 12 midnight, 106 miles. The vessel was making between 6 and 7 knots an hour with barge in tow, and without barge, about 9 knots.

Answer to Interrogatory 8. The vessel burns

about 42 barrels of oil on an average day's run of 24 hours in smooth weather.

Answer to Interrogatory 9. We cannot say.

Answer to Interrogatory 10. Yes.

Answer to Interrogatory 11. It is correct.

Answer to Interrogatory 12. Light on the barge went out about 6:15 P. M. Friday, September 5th.

Answer to Interrogatory 13. No; it was not relit; the sea was too heavy to permit approach to the barge.

Answer to Interrogatory 14. The master of the steamship "Hardy" did not tell the steamer "Beaver" that the barge was a menace to navigation, or words to that effect.

NATHAN H. FRANK,

IRVING H. FRANK,

Proctors for Claimants. [23]

Receipt of a copy of the within Answer and Answer to Interrogatories is hereby admitted this 26th day of January, 1914.

McCLANAHAN & DERBY,

Proctors for Libelants.

[Endorsed]: Filed Jan. 27, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [24]

[Title of Court and Cause.]

Stipulation as to Testimony of Arthur Self.

It is hereby stipulated and agreed that Captain Arthur Self of the steamer "George W. Fenwick," now plying between San Pedro, California, and Astoria, Oregon, would testify to the following facts if

called as a witness by libelants in the above cause:

That in September, 1913, he was master of the steam schooner "Iaqua"; that on September 6th, 1913, he left the shipyard of Kruse & Banks at Coos Bay in said "Iaqua" at 9 A. M. bound for San Francisco, and arrived at San Francisco at 5:45 A. M. on September 8th, 1913; that during the voyage the weather was comparatively calm, with a smooth sea throughout.

It is further stipulated that said testimony may be used by libelants with the same force and effect as if said witness were personally present and testifying in the above cause (without taking the deposition of said witness), subject to all objections as to the competency, relevancy and materiality thereof.

Dated: May 27th, 1914.

McCLANAHAN & DERBY,

Proctors for Libelants.

NATHAN H. FRANK,

IRVING H. FRANK,

Proctors for Libelee. [25]

[Endorsed]: Filed May 28, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [26]

[Title of Court and Cause.]

Depositions of O. P. Britt et al.

(DEPOSITIONS TAKEN BEFORE ANNIE SMITH, NOTARY PUBLIC.)

BE IT REMEMBERED that on the 16th day of May, 1914, pursuant to the stipulation of counsel hereunto annexed, at the offices of John G. Mullen,

Rooms 5-7 Bank of Oregon Building, North Bend, Oregon, personally appeared before me, Annie Smith, a Notary Public for the State of Oregon, duly authorized to take depositions, affidavits, etc., and the Commissioner agreed upon by counsel. O. P. Britt, L. H. Christensen, J. Dunson and K. V. Kruse, witnesses produced on behalf of libelants, and L. F. Falkenstein and Edgar M. Simpson, witnesses produced on behalf of the claimants herein; John G. Mullen appeared as counsel for libelants and C. R. Peck appeared as counsel for libelee and claimants, and the said witnesses having been by me first duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth in the cause aforesaid did thereupon depose and say as is hereinafter set forth: [30]

[Deposition of O. P. Britt, for Libelant.]

O. P. BRITT, called for libelant, sworn.

Direct Examination by Mr. MULLEN.

Q. State your name, age, residence and occupation.

A. O. P. Britt, forty-one years old, keeper of the Coos Bay Life Saving Station, residence at Empire, Oregon, or close by.

Q. How long have you held the position as keeper of the Coos Bay Life Saving Station?

A. Very near four years. It will be four years this August.

Q. Were you keeper of the Life Saving Station on the 5th and 6th days of September, 1913?

A. Yes.

Q. Captain, who keeps the records as shown by

(Deposition of O. P. Britt.)

your Journal U. S. Life Saving Station for the year 1913? A. I do.

Q. You are the keeper—just explain the system which you use to get the weather reports, condition of the surf, bar, etc.

A. This is all taken from the men who are on watch. They are on watch four hours each. The conditions of the surf, the direction of the wind, the force of the wind and condition of the weather, thermometer and barometer are taken four times a day. We have slates—regular log slate in the station, and when the man comes off watch he puts all this down for his watch and the next morning I take it off and transfer it to this book (Journal U. S. Life Sav. Station for 1913). It is a true copy of the watchman's report that is on watch during that time. At the end of the week I take a transcript for the week and that goes to headquarter's office to the district superintendent at Washington and is kept on file. This is all I have to go by. I don't know anything about it, particularly what the weather conditions are during the night. [31]

Q. I will show you Libelant's Exhibit No. 1 and ask you whether or not this is a true copy as shown by your journal for the 5th and 6th days of September, 1913?

A. Yes, as near as I can tell it is an exact copy.

Q. Have you compared the two of them?

A. It is an exact copy with the exception of things relating to the station.

Q. That is it is an exact copy so far as the surf,

(Deposition of O. P. Britt.)

barometer, thermometer and velocity of the wind are concerned?

A. It is an exact copy of the weather conditions and *conditions surf* as indicated here.

The writing just referred to and identified by the witness marked Libelant's Exhibit No. 1 was then offered in evidence.

Mr. PECK.—No objection is made to the fact that the exhibit as offered is a copy rather than the original, for counsel has examined the exhibit as offered, with the original books of record now before the referee, and counsel is satisfied that the same is a true and correct copy, but libelees object to the same as being incompetent, irrelevant and immaterial and not the best evidence, for the reason that the original record was not made by the persons making the investigation and taking the readings but was made by the witness from data furnished to him by third parties, and for the further reason that the same is irrelevant and incompetent to prove in any manner the condition of the weather or conditions of the sea at the point where the barge broke loose from the steamer "Hardy" on the night of September 7th, 1913.

Q. Captain Britt, are the original entries, made by the men who report to you, kept for record?

A. In which way do you mean?

Q. The documents or whatever you take the entries from that you make here, are those saved? [32]

A. No, as soon as I take this off the slate it is wiped

(Deposition of O. P. Britt.)

out. As soon as I take the records off the slate they are all destroyed.

Q. Based upon the weather report as shown on September 5th, 1913, under Libelant's Exhibit No. I, would it have been possible for the "Hardy" or any other steamship to launch a small boat in the lower Coos Bay?

Mr. PECK.—Objected to as incompetent, irrelevant and immaterial and not tending to prove or disprove any of the issues of this case.

A. A boat could have been launched in the lower bay, but probably not on the bar—can't call that the lower bay. Anywhere in the lower bay a boat could have been launched, in my opinion, any time, such as steamers carry, life-boats.

Q. As shown by your report at sunset on September 5th, 1913, what, approximately, in miles, would be the velocity of the wind?

A. Four or five miles perhaps. Not over that.

Q. That would be per hour? A. Yes.

Q. And from what direction? A. Northwest.

Q. What was the condition of the barometer at the same time? A. The barometer stood 30.15.

Q. Is that a good barometer?

A. That is a good glass.

Q. As to the conditions of the surf, based upon Libelant's Exhibit No. I, what was the condition of the surf?

A. Quite moderate on the bar. We don't pay much attention to the beach surf. We look after the bar more. It was quite a moderate surf.

(Deposition of O. P. Britt.)

Q. What do you mean?

A. That it would not be breaking any. We would not say it was [33] breaking any on the bar, except on the spits—not in the channel.

Cross-examination by Mr. PECK.

Q. Mr. Britt, do you think that your observations at Coos Bay would throw much light on the condition of the sea at Point Gorda, on the California coast?

A. No, I do not. The weather conditions may be entirely different there at the same time.

Q. What was the chance of the steamer “Hardy” on September 6th or September 7th being able to launch a small boat at sea at any point between Point Gorda and Coos Bay?

Mr. MULLEN.—Object to that on the ground that the witness has no visible personal knowledge of the conditions at Point Gorda, and as incompetent.

A. That is another question that I cannot answer. That is something that I would not know. Perhaps in the vicinity, from all records we have, a boat could have been launched.

Q. You cannot give any intelligent testimony about the condition of the weather except in the immediate vicinity of Coos Bay?

A. No, I cannot. That is all we have to go by, is what we can see.

Q. How far from the Coos Bay bar to sea do you think your judgment would be worth anything on a question as to whether you could launch a boat from the steamer “Hardy” on the dates in question?

(Deposition of O. P. Britt.)

A. Probably ten miles.

Q. Do you remember anything about the particular time that the "Hardy" took this tow to sea?

A. No, I just remember seeing her go down the bay with the tow, but I could not state what date it was without referring to my books.

Q. Do you remember what time of the day it was?
[34]

A. Along in the afternoon. Probably anywhere between 2:30 and 5 o'clock, because I had been to Empire and I was going home in my boat and passed her on our way down.

Q. Did you notice at that time whether there was a light burning on the tow or not?

A. No, I did not. It was in daylight and I would not have seen it anyway.

Q. You have no recollection about that either way?

A. No, I would not know.

Q. Did you notice particularly that day how close she stood to the water?

A. No, sir, I know they were towing with quite a short line down the bay, but I suppose they lengthened it when they got to the bar.

Q. Did you note that the tow was a flush decked barge over which the seas washed continuously?

A. Yes. No seas washing over though.

Q. Over which the seas would wash continually in a rough sea? A. Yes.

Q. Even at that time on September 5th, 1913, when you noted it going down the bay, do you think it would have been possible at sea off Coos Bay, to board

(Deposition of O. P. Britt.)

the tow in a small boat from the "Hardy" and return to the "Hardy"?

A. Yes, I think it would so far as anything that I know.

Redirect Examination by Mr. MULLEN.

Q. Captain, do you know the distance from the Coos Bay Bar to the Porter Mill?

A. No, I could hardly say. [35]

Q. Now, Captain Britt, you think then that on the evening of September 5th a small boat could have been launched any place in the lower inner bay and, except on the bar itself, for a distance of about ten miles out to sea?

A. Yes, I believe in my judgment that could have been done without any risk, so far as anything that I know.

Recross-examination by Mr. PECK.

Q. On Libelant's Exhibit No. I, your report for Saturday in the original book under the head of General Remarks shows an accident on the bar to a fishing-boat, does it not? A. Yes.

Q. Just what did happen on the bar that night, in your own language, Mr. Britt?

A. Well, about seven o'clock I think this happened. That night when they saw three fishing-boats attempting to cross in over the bar, the last one was swamped, and we went out after that in the life-boat. We finally found it by the whistling-buoy, after cruising around a while, I think about nine o'clock. I think it was about nine o'clock that we found the

(Deposition of O. P. Britt.)

boat; we took it in tow and attempted to go into Big Creek with it so we laid out all night and came in the next morning. It was a little too dark to come in for what we had on ahead so we laid out and came in the next morning. This boat that swamped would not have swamped but it got out of the channel on the spit.

Q. But on the night of September 6th you did not regard it as safe to come in over the bar with the boat that had been swamped, and you laid out over night?

A. Yes. I didn't regard it as being safe on account of being dark, with a swamped boat in tow.

(Witness excused.) [36]

[Deposition of L. H. Christensen, for Libelant.]

L. H. CHRISTENSEN, called for libelant, sworn.

Direct Examination by Mr. MULLEN.

Q. State your name, age, residence and occupation.

A. My name is L. H. Christensen, fifty-three years old, occupation ship carpenter.

Q. What various occupations have you followed, Mr. Christensen?

A. Well, from sailor, fisherman, miner and carpenter.

Q. About how many years' experience have you had in acting as a sailor and fisherman?

A. About twenty-five, I think.

Q. What was the nature of the work you performed as sailor?

A. Well, part of the time as common sailor, part

(Deposition of L. H. Christensen.)

of the time as officer and mate, and part of the time as captain.

Q. How long have you worked as a ship carpenter?

A. Off and on for about a dozen years. I can't tell exactly. Not continuously, but off and on.

Q. Where are you now employed?

A. I am employed at Kruse and Banks' in Porter.

Q. Were you employed by Kruse and Banks, and did you assist in the construction of a certain scow or barge which the American steamship "Hardy" took in tow on the date September 5th, 1913?

A. Yes.

Q. State whether or not in your opinion that barge or scow was staunchly built and seaworthy.

Mr. PECK.—Objected to as the witness is not qualified.

A. Yes, in my opinion it was well built—I think as well built as anything could be built.

Q. Were you present when the scow left for San Francisco? A. Yes.

Q. What was the nature of the light which was placed on the scow? [37]

A. To the best of my recollection the light was the same kind of light as they use for beacon lights here on the bay.

Q. It would be considered a standard light at that time? A. Yes.

Cross-examination by Mr. PECK.

Q. What kind of a light was it?

A. It was a range-light, of corrugated glass. I

(Deposition of L. H. Christensen.)

don't know its dimensions, but it must be over eight inches in circumference.

Q. Did you ever have any occasion to examine particularly the range-lights on the bay?

A. Not particularly. I have noticed them and seen them lights all the time. I have not noticed them particularly.

Q. What makes you think it was the same kind?

A. Because it looked like the other lights there is on the bay.

Q. How long since you examined some of the range-lights on the bay?

A. Two or three months, maybe more.

Q. Have you ever attended those lights?

A. No.

Q. What opportunity have you had for examination of the range-lights?

A. Passing by them, and also having hold of them.

Q. Did you ever light one of them? A. No.

Q. You never examined them any more than anybody else would that happened to go near them?

A. Maybe not.

Q. You never took any particular notice of them, did you?

A. Yes, I took particular notice of them, because I am familiar with lights—have been, and took particular notice of them because they were first class lights.

Q. Where did this light come from that was placed on the barge? [38]

A. I can't say for certain, but I believe it came

(Deposition of L. H. Christensen.)

from one of the keepers of them lights.

Q. Where did you get it from?

A. I saw it placed on the barge.

Q. Where did it come from when they put it on the barge?

A. I don't know where it came from.

Q. Can you describe it a little more as to just what kind of a light it was?

A. No, I can't do it. Would not know where to begin and where to end.

Q. What kind of oil did it burn? A. Lard oil.

Q. What kind of a wick did it have?

A. I don't know.

Q. How much lard oil was placed in the lamp?

A. I don't know.

Q. Was it placed stationary or was it placed on a swing?

A. It was placed on a square scaffold raised on the deck of the barge itself and placed so it would swing perpendicularly and still not swing around.

Q. Was that light burning when the boat went out? A. I don't know.

Q. Did you see it when it left the dock?

A. I don't remember.

Q. Do you remember whether the light was lit when the boat left or not? A. No.

Q. You still work for Kruse and Banks?

A. Yes.

Q. Did you work on this particular barge?

A. I worked a little on it, I don't remember how much. [39]

(Deposition of L. H. Christensen.)

Q. Did you ever have any experience in towing?

A. Yes.

Q. How much?

A. I don't know. Quite considerable.

Q. Do you know what kind of a barge it takes to make a good, staunch towing barge; do you know the elements that go to make up a staunch towing barge? A. I don't understand your question.

Q. Some boats might make staunch boats to sail or move under their own power, but would not be very good to tow.

A. Well, a scow, yes, ought to be a good towing barge.

Q. You think this barge was built staunchly for towing purposes? A. Yes.

Q. How much have you ever been in the towing business?

A. I have not been in the towing business but very little, but I have been towing to sea considerable.

Q. You never been on a tow-boat?

A. I have been towing but very little.

Redirect Examination by Mr. MULLEN.

Q. Do you remember at what time the Hardy left the Porter Mill wharf with the barge in tow?

A. No.

(Witness excused.) [40]

[Deposition of J. Dunson, for Libelant.]

Mr. J. DUNSON, called for libelant, sworn.

Direct Examination by Mr. MULLEN.

Q. State your name, age, residence and occupation.

A. Joseph Dunson, keeper of Cape Arago Lights. Fifty-eight years of age.

Q. The Cape Arago Lights at the entrance to Coos Bay? A. Yes.

Q. How long have you been keeper of the Cape Arago Lights?

A. Cape Arago Lights, two years this August.

Q. How long prior to that time have you been keeper of other lighthouses?

A. Twenty-three years. That is, all told, I am on my twenty-fourth year.

Q. You were the keeper of the Cape Arago Lighthouse on the 5th day of September, 1913, were you?

A. Yes.

Q. Just go ahead and state the general condition of the weather and the sea on the evening of September 5th, 1913.

A. Sir, I have it in my journal. It was light north-westerly wind.

Q. What was the condition of the surf?

A. Moderate. What I called moderate, I got it down.

Q. Are you testifying from your personal recollection or from the journal itself?

A. No, sir; from the journal itself.

(Deposition of J. Dunson.)

Mr. PECK.—I move to strike out the evidence of the witness as not the best evidence.

Q. Have you got your journal with you?

A. No, sir. No, but I went and looked at it before I came up, but as nobody had said anything about bringing it along I did not bring it. [41]

Q. Have you any independent recollection of the condition of the weather on the evening of September 5th, 1913, without reference to your journal?

A. Well, I remember of the "Hardy," when she towed the barge outside. I remember she stopped outside the bell-buoy either to light her light or lengthen her line. I was in the tower at the time getting ready to light up.

Q. Where is the bell-buoy located?

A. It is located on what is known as Baltimore Rock.

Q. Is it inside or outside the Coos Bay Bar?

A. Outside, sir.

Q. Do you know at what time the "Hardy" crossed out?

A. No, I know I was in the tower getting ready to light the light and the time that I speak of was when she was off the bell-buoy.

Q. About, to the best of your judgment, what time would that be?

A. Between five and six o'clock, I should judge. I could tell by looking, if I was to home. It was at sundown, whatever time that would be at that time of the year.

(Deposition of J. Dunson.)

Q. What was the condition of the surf and the sea at that time?

A. Well, it wasn't bad. Couldn't consider it bad at all.

Q. You recall that from your own recollection?

A. Yes.

Q. Without reference to any records?

A. Yes.

Q. What was the condition of the wind?

A. It was westerly wind outside.

Q. Was it a strong wind?

A. No, sir; I should call it a light wind.

Q. Then as to the time that the "Hardy" crossed out, you have no way of fixing that time?

A. No, only at sundown we light our light. Just what time it was [42] at that time of year, I think it was between five and six o'clock. Between the bar and bell-buoy is about twenty minutes with a barge in tow.

(Witness excused.) [43]

[Deposition of K. V. Kruse, for Libelant.]

Mr. K. V. KRUSE, called for libelant, sworn.

Direct Examination by Mr. MULLEN.

Q. State your name, age, residence and occupation.

A. My name is K. V. Kruse, sixty years of age, residence, North Bend.

Q. Are you a member of the copartnership composed of K. V. Kruse and Robert Banks?

A. Yes.

(Deposition of K. V. Kruse.)

Q. One of the libelants in this suit?

A. Yes, supposed to be.

Q. How many years' experience have you had in the building of boats, vessels and scows, Mr. Kruse?

A. I was in a shipyard when I was fourteen years old.

Q. You have been there ever since?

A. I have been there ever since, except six or seven years at sea.

Q. Approximately how many boats, vessels, scows and sea-going ships or vessels have you built or worked on?

A. Well, of course while we have been in business— It is pretty hard to tell.

Q. What you have worked on?

A. Fifty or fifty-one since we have been in business, and I suppose I have worked on several hundred before that.

Q. Did you have an opportunity to inspect and look over the barge or scow which the "Hardy" towed to San Francisco last fall that was lost?

A. Well, partially. I planned or designed it. My partner had charge of the building of it. Of course, I was there right along, more or less.

Q. State whether or not this barge was staunchly built and a seaworthy barge.

A. Yes, she was quite staunch and seaworthy. The inspector in [44] San Francisco can testify to that. Mr. Percival (?), you can refer to him.

Q. Can you state at what time the "Hardy" left the Porter Mill wharf with the barge in tow on the

(Deposition of K. V. Kruse.)

evening of September 5th, 1913?

A. Yes; ten minutes past five o'clock. I know, because the men had quit work at five o'clock, and I looked at my watch when she left.

Q. Describe, as nearly as you can, the nature and kind of a light that had been placed on the scow.

A. The light we obtained from the Government man who attends to the Government lights. It was about ten inches in diameter, corrugated glass, and stands about two feet high, I should judge. It is what they use on these beacons in the bay, the same light.

Q. What kind of oil do they burn?

A. I can't exactly tell. I forget the name of it, but what they use in this was a sort of a lard oil, I think. Mr. Banks got the oil from the lighthouse-man that attends to the beacon lights. Signal oil, is the name of it.

Q. Was the light on the scow lit at the time it left?

A. It was lit before she left. I helped to light the lights. Captain Jackson and myself lit the lights and it was burning when the barge left. I told him to see that the light was burning before they left; and it was burning when they left.

Cross-examination by Mr. PECK.

Q. Did you recover and cause to be repaired, this barge, Mr. Kruse?

A. We received our insurance. Whatever the insurance amounted to, I forget now exactly what we did receive.

(Deposition of K. V. Kruse.)

Q. Did your insurance cover all the expenses?

A. We had nothing to do with it. We had the barge insured [45] from here down and whatever damage and expense there was, the insurance company attended to that.

Q. Then personally the firm of Kruse & Banks had been out no money because of any damages?

A. No, we are not out any.

Q. The insurance company has paid off the damages and expense of recovery?

A. Yes, so far as I know, unless it may be part of Mr. Bank's expenses going to San Francisco.

Q. How long was this light supposed to burn?

A. We had put up the same kind of light on the other barge and that burned after we got into the city. Supposed to burn at least sixty hours, I believe. The other light burned that length of time.

Q. Do you know whether the light had oil in it when the barge was recovered?

A. That I do not know.

Q. Did she have a full supply of oil when you lighted the lamp?

A. Yes, the lamp was full, and I gave the captain a gallon of oil in case it should run short, and also gave him an extra lamp-glass in case it should break.

Q. How do you reconcile your testimony that the barge left here at ten minutes past five o'clock, when the lighthouse-keeper says that he saw it at the bell-buoy outside the bar at the time he was lighting his light.

A. I know because I am sure. He ain't. I am

(Deposition of K. V. Kruse.)

positive. I can swear to it.

Q. You think, then, that the lighthouse-keeper must be mistaken.

A. Yes. The ship's log will tell that if the captain put it down right.

(Witness excused.) [46]

[Deposition of L. F. Falkenstein, for Libellee.]

L. F. FALKENSTEIN, called for libellee, sworn.

Direct Examination by Mr. PECK.

Q. State your name, age, residence and occupation.

A. L. F. Falkenstein, age thirty-eight, residence, North Bend Oregon.

Q. What is your business? A. Office man.

Q. For whom? A. Simpson Lumber Company.

Q. In what capacity are you employed by the Simpson Lumber Co.? A. Cashier.

Q. Were you so employed by the Simpson Lumber Company on September 5th, 1913? A. Yes.

Q. Were you in the office of the Simpson Lumber Company at North Bend, Oregon, on the date that the American steamship "Hardy" towed a barge built at the Kruse & Banks ship building yards at North Bend, Oregon, from North Bend to San Francisco, said time being approximately September 5th, 1913?

A. I was either in the office or on the wharf, because I saw the vessel go by with the barge in tow, but I do not remember just where I was.

Q. Did you have any conversation with K. V. Kruse or R. Banks, or either of them, with reference

(Deposition of L. F. Falkenstein.)

to the tow-line by which said barge was being towed?

A. I had a conversation over the telephone with a man about the tow-line, and I would say it was Banks.

Q. Where were you and under what circumstances did this conversation occur? [47]

A. I was in the office of the Simpson Lumber Company, and when I answered the telephone call he asked if the "Hardy" could have a tow-line to tow the barge to San Francisco, and I told him that the tow-line was in the office, but he would have to see Captain Edgar about the loan of it. That is, the tow-line was in the building, not in the office.

Q. Did the party on the other end of the telephone tell you who it was that was speaking? A. No.

Q. Did you recognize the voice as being the voice of any particular person?

A. I inferred that it was Mr. Banks from his voice I have had several conversations over the telephone with him and always recognized his voice when talking.

Q. Is it customary or usual for Mr. Banks in talking with you over the telephone to tell you who is speaking? A. No.

Q. At this time, are you satisfied as to the identity of the person who was talking with you over the telephone? A. In my own mind I am, yes.

Q. And in your own mind you are satisfied that that person was who? A. Mr. Banks.

Q. Mr. Robert Banks, one of the libelants in this suit? A. Yes, Mr. Robert Banks.

(Deposition of L. F. Falkenstein.)

Q. Copartner with K. V. Kruse in the ship building business?

A. Yes, of the firm of Kruse & Banks.

Q. Now, state as near as you can, word for word, just what Mr. Banks said to you over the telephone on the date mentioned.

A. When he called, as I said before, he asked if the "Hardy" could have the hawser to tow the barge to San Francisco. [48]

Q. What was your reply, as near as you can remember?

A. I told him that the hawser was in the building and he would have to make arrangements with Captain Edgar, that I had no authority to let the hawser go.

Q. At the time of the conversation, did you see the hawser?

A. Yes, I turned from the 'phone and looked out into the old store building when I talked to him and saw it.

Q. How long afterward was the hawser taken?

A. Within the next two days. I do not remember just when. I wasn't at the office when the hawser was taken away.

Q. Do you know who got the hawser?

A. Some of the steamship "Hardy's" crew.

Cross-examination by Mr. MULLEN.

Q. Mr. Falkenstein, what time of day do you recall it crossed out? A. I cannot say.

Q. Did Robert Banks have more than one con-

(Deposition of L. F. Falkenstein.)

versation with you last fall relative to the securing of the hawser?

A. Not that I remember of. I remember of only one conversation.

Q. Have you any way of fixing the time when that conversation took place? A. I have not.

Q. Do you know whether or not there was a second barge towed from the Kruse & Banks Shipyards about this same time?

A. There were two barges towed down that I am sure of.

Q. Have you any way of fixing the conversation that you had with Mr. Banks relative to the tow-line, as to which barge he was talking in regard to?

A. No, I have not.

Q. You do not know whether it was the barge the "Hardy" towed or the other barge? [49]

A. This barge that this conversation was in regard to was the barge that the "Hardy" towed, because he asked for the tow-line for the "Hardy."

Q. But you, representing the Simpson Lumber Company, did not authorize any person to take the line, did you? A. No, sir.

Redirect Examination by Mr. PECK.

Q. Do you remember whether you stated that he could have it if satisfactory with L. J. Simpson as well as Edgar, or whether you referred to only one of the Simpsons?

A. I just referred to Edgar. I remember that. I said you will have to make your arrangements with

(Deposition of F. L. Falkenstein.)

Edgar. I did not say Edgar Simpson, but knew he would know who I was talking about.

Q. Do you know that the tow-line was taken within two days after that conversation?

A. About that time.

Q. And was that the trip of the "Hardy" in which she lost a barge belonging to Kruse & Banks?

A. Well, I don't know that she lost two, but the time I saw her going out I know that she lost that barge, from hearing of it afterwards.

Q. And when was the telephone communication which you had with Mr. Banks with reference to the time that you saw her go out?

A. A few days before that.

Q. How long before?

A. It wasn't over two days, I don't believe.

(Witness excused.) [50]

[Deposition of Edgar M. Simpson, for Libelee.]

EDGAR M. SIMPSON called for libelee, sworn.

Direct Examination by Mr. PECK.

Q. State your name, age, residence and occupation.

A. Edgar M. Simpson, age thirty-three, residence, North Bend, Oregon, lumber business.

Q. Are you connected with the Simpson Lumber Company, and if so in what capacity?

A. Manager of the Simpson Lumber Company.

Q. Were you manager of the Simpson Lumber Company in September, 1913? A. Yes.

Q. Do you remember of the trip which the American steamship "Hardy" made towing a barge for

(Deposition of M. Simpson.)

Kruse & Banks from North Bend to San Francisco, leaving Coos Bay on September 5th, 1913?

A. I remember she made a trip about that time.

Q. What do you know about the tow-line which was used by the steamship "Hardy" in towing that barge?

A. I know that the line belonged to the Simpson Lumber Company.

Q. How was it obtained from the Simpson Lumber Company and who obtained it?

A. The shipyard telephoned to our office and asked permission for the use of the line. Mr. Falkenstein answered and told them it was all right if I was willing. He afterwards mentioned it to me and I said it was all right.

Q. Did you have any conversation with the master of the steamship "Hardy" before he sailed on that trip with reference to the tow-line? A. Yes.

Q. What was that conversation?

A. I met him somewhere and he asked me if I was going to charge him for the use of the line. I told him no, that the shipyard would have to pay.

Q. To whom did you understand that the Simpson Lumber Company was [51] loaning the line?

A. Kruse & Banks shipyard.

Cross-examination by Mr. MULLEN.

Q. Did either Mr. Kruse or Mr. Banks say anything to you in reference to the tow-line?

A. At the time or after?

Q. At the time. A. Not that I remember of.

(Deposition of M. Simpson.)

Q. Just tell what Falkenstein said to you in reference to the tow-line?

A. Nothing was said to me about the line except that Falkenstein mentioned the fact that he had been called up and asked for the line.

Q. Do you know when that was?

A. No, I do not remember.

Q. Did Mr. Falkenstein tell you in his conversation what the tow-line was wanted for?

A. I guess he must have said it was for the "Hardy."

Q. Do you remember whether or not he did say so?

A. No, I cannot say for sure.

Q. Or do you know whether or not it was with reference to the particular barge in question?

A. No, I cannot say that positively.

Q. If there was another barge shipped about a week later, might it have been in reference to the tow-line for that barge?

A. Yes, it might have been.

Q. Then you never authorized Kruse & Banks, or either of them individually, to get the tow-line?

A. Not personally no. [52]

Redirect Examination by Mr. PECK.

Q. If it had been a subsequent barge that had been towed by some other vessel then you would not have told the master of the steamship "Hardy" that you wanted to charge this particular tow-line to Kruse & Banks? A. No, certainly not.

Q. You do know by reason of your conversation

(Deposition of M. Simpson.)

with the master of the steamship "Hardy" that the tow-line in question had to do with the towing of this particular barge by the steamship "Hardy"?

A. That is my impression that this is the barge it was for.

(Witness excused.) [53]

[Recital as to Libelant's Exhibit No. 1.]

(Libelant's Exhibit No. 1, which was originally attached to the original depositions of O. P. Britt et al., at this place, has been detached and is transmitted to the Circuit Court of Appeals in its original form, as per order of Court pertaining thereto.) [54]

[Title of Court and Cause.]

**Depositions Taken Before U. S. Commissioner,
Krull.**

BE IT REMEMBERED that on Monday, May 25, 1914, pursuant to the notice hereto attached, and the stipulation of counsel entered herein, at the office of Messrs. McClanahan & Derby, No. 1101 Merchants Exchange Building, in the City and County of San Francisco, State of California, personally appeared before me, Francis Krull, United States Commissioner for the Northern District of California, Richard C. Brennan.

Messrs. McClanahan & Derby appeared as proctors for libelant, and Nathan H. Frank, Esq., appeared as proctors for respondent, and the said witness, having been by me first duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth

in the cause aforesaid, did thereupon depose and say as hereinafter set forth.

(It is hereby stipulated and agreed by and between the [58] proctors for the respective parties, that the deposition of Richard C. Brennan may be taken *de bene esse* on behalf of the libelant, at the office of Messrs. McClanahan & Derby, Room No. 1101 Merchants Exchange Building, in the City and County of San Francisco, State of California, on Monday, May 25, 1914, before Francis Krull, a United States Commissioner for the Northern District of California, who is fully authorized to take acknowledgments of bail and affidavits, etc., and in shorthand by Charles R. Gagan.

It is further stipulated that the deposition, when written out, may be read in evidence by either party on the trial of the cause; that all questions as to the notice of the time and place of taking the same are waived, and that all objections to the form of the questions are waived, unless objected to at the time of taking said deposition, and that all objections to the materiality and competency of the testimony are reserved to all parties.

It is further stipulated that the reading over of the testimony to the witnesses and the signing thereof is hereby expressly waived.) [59]

[Deposition of Richard C. Brennan, for Libelant.]

RICHARD C. BRENNAN, called for libelant, sworn.

Mr. DERBY.—Q. What is your occupation?

A. Master mariner.

(Deposition of Richard C. Brennan.)

Q. How long have you been a master mariner?

A. I have been a master mariner three years; I have been going to sea for 18 years.

Q. What vessel are you on now?

A. The steamship "Admiral Farragut."

Q. Where does she ply?

A. From San Francisco to Seattle and Tacoma.

Q. Are you leaving this afternoon for Seattle?

A. Yes, sir.

Q. In the month of September, 1913, what vessel were you on? A. On the steamship "Watson."

Q. Were you on her as master?

A. I was master.

Q. Do you remember, Captain, making a voyage from San Francisco to Seattle on the "Watson" upon which you left San Francisco on September 6, 1913? A. Yes.

Q. What time did you leave San Francisco on that day? A. I left on September 6th.

Q. I mean at what time?

A. At 3:51 P. M. in the afternoon.

Q. Do you remember seeing a barge, Captain, at any stage of that voyage? A. Yes, sir.

Q. When was it?

A. It was on the morning of the 7th, at 7:05 A. M.

Q. Where were you when you saw that barge?

A. I was up in about latitude 39 degrees 45 minutes north, longitude 124 degrees 10 west. I was about 23 or 24 miles northwest of Fort Bragg.

Q. How far were you offshore?

A. Possibly eleven or twelve [60] miles.

(Deposition of Richard C. Brennan.)

Q. Where was the barge in relation to your vessel?

A. When I seen the barge, it was about two miles outside of me, to the west of me.

Q. Did you go any closer to the barge?

A. Yes, I altered my course and went out right close to her, 300 or 400 feet from her, and looked at her.

Q. What kind of a barge was it?

A. It was a flush-deck barge, red painted, about 40 by 80, or something like that.

Q. Could you tell whether it was a new or an old barge?

A. It was a brand new barge, I was right close to it.

Q. Was your vessel going on her usual course between San Francisco and Seattle? A. She was.

Q. How was the barge, with reference to being in the fairway of the usual course of vessels, or not?

A. Yes, she would be right in the fairway.

Q. Was there any light on the barge?

A. There was a tripod there with a lantern, but I don't think the light was lit. It was daylight. There didn't seem to be any light. There was a tripod there for a lantern.

Q. Was there anyone on board the barge?

A. No, sir.

Q. How was the weather, with reference to its being clear or foggy at the time the barge was sighted?

A. The weather up to that time had been clear.

Q. Did you see any towing-line on the barge?

A. Yes, there was a wire bridle and it had some

(Deposition of Richard C. Brennan.)

part of a hawser attached to it; I could not tell how much, because it led from each corner of the barge down into the water; it was dragging.

Q. Was the bridle intact?

A. The bridle was intact, yes, sir. [61]

Q. Now, Captain, will you take this chart and draw on it the position where that barge was when you sighted her? A. Yes, I will.

Q. Mark that "X." (The witness does as directed.)

Q. Now, the center of that "X," as I understand it, is where you saw the barge; is that correct?

A. That is correct.

Mr. DERBY.—I offer the chart in evidence and ask that it be marked "Libelant's Exhibit A."

(The chart was here marked by the Commissioner, "Libelant's Exhibit A.")

Cross-examination.

Mr. FRANK.—Q. Mr. Brennan, I notice that you testify as to your latitude and longitude without any memorandum as an aid; you, of course, don't remember that after all this length of time, do you; you have not that in your memory, have you, all this time?

A. No, sir, not all the time, but I have my log-book, and I looked up the log-book to see the position of my ship at that time.

Q. Was the log-book kept by you?

A. The log-book was kept by my officers and signed by me; it is the official log.

Q. And the observation on which you fix this is not

(Deposition of Richard C. Brennan.)

entered in the log by you, is it?

A. No, sir. I have my commander's report and I entered it up in there, I copied that. That is entered by me.

Mr. FRANK.—Of course, we will have to object to that testimony upon the ground that it is hearsay.

The WITNESS.—Then I will show you this. (Showing commander's report.)

Mr. FRANK.—Well, that doesn't make it any better.

The WITNESS.—All right. [62]

Mr. FRANK.—Q. What was the condition of the weather from here up to the point when you sighted the barge?

A. There had been strong northwest weather, wind.

Q. And that same weather was prevailing when you got up there alongside of the barge?

A. The wind was dying out. The sea still remained, but the wind was not nearly as strong as it had been during the night.

Q. The sea was still heavy, was it?

A. The sea was still pretty heavy, yes, sir.

Q. You said it was clear up to that time; I suppose you mean it was clear on your way up the coast?

A. Yes, sir.

Q. You don't know what the condition was in the neighborhood of the barge, or where she was lost, during the time you were traveling from here up there? A. No, I could not say that.

(Deposition of Richard C. Brennan.)

Q. Was it misty or hazy at the time you sighted the barge?

A. No, it was just the ordinary weather you would have with the northwest wind. It was dying out. I seen Point Arena and Point Cabrillo and all the lights along the shore; you could see a long distance.

Q. That is, on your way up? A. Yes, sir.

Q. I mean at the location where the barge was?

A. Yes, you could see well when I seen the barge.

Q. Did the fog set in shortly afterwards?

A. Yes. It was a drifting fog. I got it probably an hour later; there was a little patch of it, and then we ran right out of it again. There was no fog bank, or anything like that; it was just a drifting fog that you get sometimes with strong northwest wind.

Q. That was when you got further up, was it not?

A. Yes.

Q. That was less than an hour after you sighted the barge? [63] A. Somewhere around that.

Q. How long did you delay in the vicinity of the barge?

A. We didn't stop at all hardly. I seen the barge a couple of miles outside of me and I put my helm hard aport and ran out there and went right on.

Q. Why didn't you pick her up?

A. Well, I was bound the wrong way; I could not tow her 600 miles. If I was going south, I would have picked her up, believe me; she looked good to me.

Q. Why didn't you pick her up and take her into the nearest port?

(Deposition of Richard C. Brennan.)

A. There was no port I could get into.

Q. How far was that from the port of San Francisco?

A. Around 145 miles, or something like that. I reported it to a steam schooner that afternoon. I thought he might pick her up. He didn't seem to understand me though, didn't understand what I said.

Q. When you say there was a heavy northwest sea, give us some idea about how heavy the sea was, how high the waves were?

A. We never measure them; we call the force of them by the action they have on the ship.

Q. Well, say the effect they had on the barge, for instance?

A. At that time the barge was riding along nicely; she was drifting along fine. I could have got aboard of her without any trouble at that time.

Q. Were her decks washed at all?

A. No, sir. She was flying light, running fine.

Q. How high did she sit above the water—her sides? A. She must be five feet free-board.

Q. That is what you judged?

A. Yes. She was not making any water. You could tell the way she floated on the [64] water she was nice and light.

Q. When you say she was flying light, you mean she was jumping up and down the waves light, is that it?

A. If a vessel has water in her, or is water-logged, she is heavy and moves slow; when a vessel has no

(Deposition of Richard C. Brennan.)

water in her, she is quick in her action.

Q. In other words, she was jumping quickly up on the waves, up and down?

A. No, sir; she didn't jump at all. As I tell you, she was just riding light.

Q. What do you mean by riding light? I don't understand that term.

A. If she had water in her, one end of her would go down; when she lifts the water will go to one end, and she is loggy and slow and the waves would go over her then, if there are any waves at all; what we call light is when the vessel rides easy.

Q. She rides; in other words, she is up on one wave and down on the other?

A. At the time I passed her, the waves were not big at all; she was just riding along nice and smooth.

Q. I am trying to get you to give me some idea about how big the waves were; you say there was a heavy sea on.

A. There had been all night, but I told you at that time the sea was some better; it was in better shape then. There was not much wind at the time. The wind had been blowing up until midnight around Point Arena, but it died down that morning, and it freshened up a little bit again after we came up the coast; along in that stretch there up to Shelter Cove the weather was very good.

Q. Did you see the "Grace Dollar" at that time?

A. No, sir.

Q. You could not see her? A. No, sir.

Q. Of course, the condition of the wind and sea

(Deposition of Richard C. Brennan.)

and fog at the [65] time you were there would be no criterion of what they had been during the time the "Grace Dollar" was in the neighborhood?

A. You can't tell a thing about that, you know; it might be fine there all the time you are there and then later on it would be different.

Q. There might have been a heavy sea on and also very foggy at the time the "Grace Dollar" was there?

A. Of course, the sea cannot go down very quickly.

Q. I say there might have been a heavy sea and also very foggy at the time the "Grace Dollar" was there?

A. I don't know what time she was there, or anything about that, only I say that the sea don't go down in a minute; it stays for hours.

Q. It depends on conditions, does it not?

A. I don't know how soon she was there afterwards.

Q. I say that depends on conditions, does it not, how soon the sea would go down?

A. Largely; yes, sir.

Q. I notice that at 7:50 you have an entry in this log that the fog is setting in; "8:00 A. M., pretty clear; foggy; heavy head seas; shipping water forward." That was the condition within 45 minutes of the time you sighted the barge, was it not?

A. Yes, sir.

Q. And you had gone from the time you first sighted the barge out of your course a couple of

(Deposition of Richard C. Brennan.)

miles, passed around her and then resumed your course, did you not? A. Yes, sir.

Q. How much time do you think you lost in doing that from your course? A. 25 minutes.

Q. About 25 minutes?

A. Yes, sir; that is the time we were at the barge, at 7:05; the barge was right abeam then.

Q. Your entry is at "7:05 sighted a scow adrift, two miles on the [66] port beam, hauled out and passed close to her, but found no life on board."

A. That is right. It would be about 7:15 at the time I was at the barge. We put that down. We would be proceeding on our course, and it would be at right angles to our course.

Q. And it would take you some minutes to pass around the barge; you stopped, did you not, to observe her?

A. No, I did not stop, I was just right close to her, you see.

Q. And it would take you about ten minutes more to get back to your course?

A. Well, you don't run in for those two miles; I just shaped up the course again from the barge.

Q. Well, you lost about 20 minutes, you think?

A. Possibly that; not over that.

Redirect Examination.

Mr. DERBY.—Q. Captain, have you got your commander's report with you? A. Yes, sir.

Q. Before testifying in this case, did you refresh your memory from your commander's report?

(Deposition of Richard C. Brennan.)

A. Yes, sir.

Q. And are you able to testify of your own knowledge to the facts you have testified to, after so refreshing your memory? A. Yes, sir.

Recross-examination.

Mr. FRANK.—Q. You say you are able of your own knowledge to testify to the facts after refreshing your memory. You would not be able to refresh your knowledge of facts you did not originally know, independent of that memorandum, would you?

A. Well, you know when you are going up and down the coast like I am all the time, you cannot remember everything, but when I look through my commander's report I see it right away. [67]

Q. But your commander's report is made out from this log, is it not?

A. Yes, sir; it is an abstract log.

Q. What you mean to say is, you have consulted the commander's report instead of the log to ascertain the facts you have been testifying to; is that right? A. Yes, sir.

Mr. DERBY.—Q. Captain, you saw this barge yourself, did you not? A. I certainly did.

Q. And did you take an observation of where she was?

A. Yes, sir. There is nobody puts anything down on the log, or anything on board the ship, without my approval. I am the final one as regards to the ship.

Q. And at the time these entries were made, did

(Deposition of Richard C. Brennan.)

you have personal knowledge of all the facts entered there?

A. I did. I wired to the Hydrographic Office the position of the barge. [68]

**[Certificate of U. S. Commissioner to Deposition of
Richard C. Brennan.]**

United States of America,
State and Northern District of California,
City and County of San Francisco,—ss.

I, Francis Krull, United States Commissioner for the Northern District of California, do hereby certify that the reason stated for taking the foregoing deposition is that the testimony of the witness, Richard C. Brennan is material and necessary in the cause in the caption of the said deposition named, and that said witness will be more than 100 miles from the place at the time of trial.

I further certify that on Monday, May 25, 1914, I was attended by Messrs. McClanahan & Derby, proctors for libelant, and Nathan H. Frank, Esq., proctor for respondent, and by the witness, who was of sound mind and lawful age, and that the said witness was by me first duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth; that said deposition was, pursuant to the stipulation of the proctors for the respective parties taken in shorthand by Charles R. Gagan and afterwards reduced to typewriting; that the reading over and signing of said deposition of said witness was by the aforesaid stipulation expressly waived.

I further certify that I have retained the said deposition in my possession for the purpose of delivering the same under my own hand to the United States District Court for the Northern District of California, the court for which the said deposition was taken.

And I further certify that I am not of counsel nor attorney for any of the parties in the said deposition and [69] caption named, nor in any way interested in the event of the cause named in the said caption.

I further certify that during the taking of said deposition, an exhibit was introduced and marked as follows, "Libelant's Exhibit A," and that the said exhibit is herewith returned attached to said deposition.

IN WITNESS WHEREOF, I have hereunto subscribed my hand, at my office, in the City and County of San Francisco, State of California, this 28th day of May, 1914.

[Seal]

FRANCIS KRULL,
U. S. Commissioner, Northern District of California,
at San Francisco.

[Endorsed]: Filed Jun. 2, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [70]

[Title of Court and Cause.]

Testimony Taken in Open Court.

Tuesday, June 2d, 1914.

APPEARANCES.

For the Libellants: S. H. DERBY, Esq.

For the Respondent: NATHAN FRANK, Esq.

[71]

[Proceedings Had June 2, 1914.]

Tuesday, June 2, 1914.

Mr. DERBY.—If the Court please, this is a case of negligent towage. It is claimed that the steamer “Hardy” undertook to tow the barge of Kruse & Banks from North Bend, Oregon, to San Francisco, and that on the voyage the barge was negligently lost by reason of which libellant suffered damage in having to repair the barge, and also having to salve the barge and also through depreciation of the barge.

I am perfectly willing to go on with the whole case. I don't know whether your Honor desires to first hear the evidence on the question of liability and leave the question of damages to the commissioner, or whether your Honor would prefer to hear the case.

The COURT.—I will determine the question of liability. The condition of my calendar will not permit me to take up the other branch of it.

Mr. DERBY.—Very well, your Honor. I offer in evidence the depositions of O. P. Britt, L. H. Christensen, J. Dunson and K. V. Kruse, for the libellant, taken at North Bend, Oregon. I presume it will not be necessary to read those depositions.

The COURT.—Not unless there is something special you wish to call the attention of the court to.

Mr. DERBY.—I will simply call the attention of the Court in a general way to the fact that those depositions are to the effect that at the time this barge left North Bend she was staunch, strong and seaworthy, equipped with a proper light, that the weather was moderate and was calm, and that it would have been perfectly easy for the “Hardy” to launch a boat in that weather for the purpose of re-lighting the light. The [72*—1†] light went out on the barge. Of course, Mr. Frank will disagree with me as to the effect of those depositions, but that is what I claim they establish.

I also offer the deposition of Captain R. C. Brennan, of the steamer “Admiral Farragaut.” Captain Brennan’s testimony is to the effect that on the day on which the barge was lost by the steamer “Hardy” he sighted the barge at eight A. M. in the morning, in the fairway, in the usual course of vessels, in a certain latitude and longitude which I will show or try to show was very near the latitude and longitude where the “Hardy” lost the barge.

I also refer to a stipulation as to the testimony of Captain Arthur Self. In order to avoid taking his deposition it was stipulated between the parties that Captain Self was the captain of the steamer “Iaqua,” that he made a voyage from Coos Bay to San Francisco, starting the day after the “Hardy”

*Page-number appearing at foot of page of Original Certified Apostles.

†Original page-number appearing at foot of page of Testimony as same appears in Certified Apostles.

did and arriving at San Francisco at about the same time that the "Hardy" did, and that during the voyage the weather was comparatively calm, and with a smooth sea throughout.

I want to call Captain Peterson out of order, as he is desirous of getting back to his business.

[Testimony of Henry C. Peterson, for Libellant.]

HENRY C. PETERSON, called for the libellant, Sworn.

Mr. DERBY.—Q. Captain Peterson, what is your business?

A. Launch business, taking passengers back and forth.

Q. Do you own any barges? A. Yes, sir.

Q. How long have you been in that business?

A. About 40 years.

Q. Do you remember, Captain, a barge coming to your place in [73—2] San Francisco in September, in tow of the steamer "Brunswick"?

A. Yes, sir.

Q. Was that barge turned over to you by the "Brunswick"?

A. She was turned over to me to take charge of by Captain Pillsbury.

Q. Did you take charge of it?

A. I took charge of it that evening.

Q. From the time that the barge was delivered to you, Captain Peterson, and until the time that it went on the ways at the place where it was repaired, did it suffer any further damage than it had already suffered? A. No, sir.

Q. Did you eventually buy that barge, Captain?

(Testimony of Henry C. Peterson.)

A. I did.

Q. Was the barge before it came down under contract to be sold to you? A. Yes, sir.

Q. Did you accept the barge under that contract?

A. No, sir.

Q. Why not? A. Because she was damaged.

Q. Captain, what kind of a barge is that, with reference to other barge, with reference to it being easy to tow, or otherwise?

A. She is a very strongly built barge; I don't know how much stronger she would be than any other barges.

Q. I mean with reference to her towing qualities?

A. She is a very easy towing barge on account of her ends being very much more sloped than other barges.

Mr. DERBY.—I would like, if the Court please, to ask this witness one or two questions on the subject of damages, so as to avoid having to call him again. I will be very brief about it.

Mr. FRANK.—You might have to call him again for cross-examination.

The COURT.—Does the captain live here? [74—3]

Mr. DERBY.—He lives here in the city. His assistant is away, and he is alone at his business. I found it very difficult to get him to come up here this morning.

The COURT.—There is no occasions for us to go partially into the question of damages unless we go entirely into it, and the condition of my calendar will

(Testimony of Henry C. Peterson.)

not permit it very well.

Mr. DERBY.—Very well, your Honor, that is all.

Cross-examination.

Mr. FRANK.—Q. Have you the contract with you, Captain, under which you purchased the barge originally? A. No, sir, I have not.

Q. You have that down in your office, have you?

A. Yes, sir.

Mr. FRANK.—I think I will reserve that also until we come to the question of damages.

[Testimony of Robert Banks, for Libellants.]

ROBERT BANKS, called for the libellant, sworn.

Mr. DERBY.—Now, if the Court please, this witness has come down from North Bend, Oregon, to attend the trial, and I would ask as a special favor in his case to be allowed to put one or two questions to him on the question of damages, for the reason that he will shortly return to North Bend.

The COURT.—Very well.

Mr. DERBY.—Q. Mr. Banks, what is your business? A. Shipbuilding.

Q. Are you associated with anyone else in the building business? A. Yes, sir, K. V. Kruse.

Q. Under what name?

A. The Kruse & Banks Shipbuilding Company.

Q. Where do you do business?

A. North Bend, Oregon. [75—4]

Q. Do you remember building this barge which was towed down by the steamer “Hardy”?

(Testimony of Robert Banks.)

A. Yes, sir.

Q. When was she built?

A. She was built in July and August, 1913.

Q. For whom was she built?

A. For Henry Peterson, of San Francisco.

Q. What was the sale price? A. \$4,000.

Q. How long have you been in the business of building barges? A. Since 1906.

Q. Was this barge similar to other barges which you built?

A. In a way she was, but on account of Peterson's special business of lighterage here she had an extra long rake or run put on, as we call it.

Q. What is the effect of that extra long rake?

A. It makes them easy for towing. It would not be adapted to rock carrying.

Q. Who towed that barge to San Francisco?

A. The steamer "Hardy."

Q. Did you make any agreement with the steamer "Hardy" as to the towage of that barge?

A. Yes, sir.

Q. With whom? A. With Captain Michaelsen.

Q. When was that contract made?

A. It was talked of when the barges were under construction, and I think settled along about the middle of August, that is, determined as to the price for the towing.

Q. Was it a verbal contract? A. Yes, sir.

Q. What was the contract?

(Testimony of Robert Banks.)

A. It was to tow two barges to San Francisco for \$400.

Q. Was this barge that was damaged one of the barges? A. Yes, sir.

Q. When did that tow start, Mr. Banks?

A. It started on September 5.

Q. At what time?

A. It left North Bend after five o'clock [76—5]
between five and five-fifteen.

Q. Who supplied the rope with which the towage was done? A. The steamer "Hardy."

Q. When you say five or five-fifteen, do you mean in the afternoon? A. Yes, sir.

Q. What condition was the barge in at the time the tow started? A. First-class condition.

Q. Was she seaworthy? A. Yes, sir.

Q. Was there a light on the barge? A. Yes, sir.

Q. What kind of a light was it?

A. It was a government beacon light, such as is used on the range-lights on the bay. We secured it from the tender of the light, for the purpose of using it on the barge for towing down.

Q. How much oil was there in the lamp?

A. It would hold about a quart of oil.

Q. How long will that burn? A. 60 hours.

Q. Was that all the oil you supplied?

A. No, sir, there was an extra quart of oil supplied and put under deck in the barge if necessary.

Q. Had you sent any other barges to San Francisco? A. Yes, sir.

Q. Were they sent in a similar way?

(Testimony of Robert Banks.)

Mr. FRANK.—That is immaterial.

Mr. DERBY.—I will withdraw that.

Mr. DERBY.—Q. Did anyone go down to San Francisco on the barge? A No, sir.

Q. Why not?

A. They did not consider it necessary, and being a small barge, there was danger.

Q. Do you remember what the weather conditions were when the barge left? A. Good.

Q. How far is it from North Bend to the entrance of Coos Bay? [77—6] A. About eight miles.

Q. When did you next see the barge?

A. I seen her on the 16th, here in San Francisco.

Q. On the 16th of September?

A. On the 16th of September, yes, sir.

Q. What condition was she in then?

A. She was water-logged and strained.

Q. Where did you see her?

A. At Mission street wharf, alongside of Peterson's boat landing.

Q. How soon after that was she taken to the repair ways? A. Three days, or on the 17th.

Q. Where was she repaired?

A. At South San Francisco.

Q. By whom? A. Schultz and Robinson.

Q. Who arranged for the repairs? A. I did.

Q. Were you present while the repairs were being carried out? A. Yes, sir.

Q. Did you approve the bill which was presented for those repairs? A. Yes, sir.

Q. Did you have an agent in San Francisco, Mr.

(Testimony of Robert Banks.)

Banks? A. Yes, sir.

Q. Who was that agent? A. J. E. Davenport.

Q. How long had he been your agent?

A. Ever since we started in business.

Q. Did he have full authority to act for you?

A. Yes, sir.

Q. When did you hear of the loss of this barge?

A. On September 8th, by wire from Mr. Davenport.

Q. What did you do?

A. We wired in return to use all efforts and his best judgment in saving the property and wire us whatever was being done, wire us information.

Q. How long did you say you had been in the business of building barges? A. Since 1906. [78—7]

Q. Have you sold barges for delivery in San Francisco?

A. Not that size; the other barges we delivered here were larger.

Q. But you have delivered barges in San Francisco? A. Yes, sir, car floats.

Q. Will you state what the value of that barge, delivered in San Francisco in good condition, would be, Mr. Banks?

Mr. FRANK.—I think the value has already been proven by the contract itself.

Mr. DERBY.—I wish to prove that owing to her being built in North Bend, Oregon, instead of in San Francisco, she had a higher value in San Francisco than she would have there.

Mr. FRANK.—The contract price was for her

(Testimony of Robert Banks.)

delivery in San Francisco.

Mr. DERBY.—I know that, but that is not conclusive evidence on the subject.

Mr. FRANK.—The trouble about it is that Mr. Banks is suing here for damages for the loss of the barge. What were his damages?

Mr. DERBY.—Suppose you should claim that the value was less than the contract price. The mere fact that he contracted to sell her for \$4000 does not prevent him from proving that she had a higher value.

The COURT.—Maybe not, but it would prevent him from recovering for any higher value.

Mr. DERBY.—That would be a question for argument later.

The COURT.—You mean to say that after I sold a house to a man for a certain sum and it developed afterwards that I could get more from a third party than I got from the man to whom it was sold, that I would be entitled to that greater sum?

Mr. DERBY.—I am not prepared to say that at this time, [79—8] your Honor, that you could, but I submit that this evidence may become material.

The COURT.—It could only become material if the respondent would undertake to show that the value was less than that. On that theory, the testimony will be taken, but not for any purpose of increasing the amount above the sale price.

A. For barges similar to her dimensions and constructed along those lines, they pay from \$4500 to

(Testimony of Robert Banks.)

\$5000 here. Of course, we have to make some inducement building up the coast to get this work, and we built the barge for what we considered reasonable.

Q. (Mr. DERBY.) Did you make any efforts, after this barge was repaired and Captain Peterson refused to take her, to sell the barge?

A. We had seen several parties here who were interested in barges, such as Healy-Tibbitts, Crowley, and the Oakland Launch Company, trying to dispose of the barge.

Q. Were you able to get any offer for her?

A. No, sir, we got no offer.

Cross-examination.

Mr. FRANK.—Q. Mr. Banks, when did you have your first conversation with Captain Michaelsen about bringing this barge down?

A. I have not got the dates of that, but it is along in July. We built the barges in July and August, and it was along while we were building them, having them under construction. The Captain came in every eight or ten days, and I talked the matter over with him as to the towing, or what he would tow them for.

Q. Just relate what you said and what he said upon that subject?

A. I asked him to give me a price for towing two barges to San Francisco.

Q. When was that? A. That was in July, 1913.

Q. That was the first conversation?

(Testimony of Robert Banks.)

A. That was the first conversation. [80—9]

Q. What was his reply?

A. His reply was—I don't think he gave me a definite reply at first; he said he would let me know later.

Q. He said he would let you know later?

A. Yes, sir.

Q. When did he meet you again on the matter?

A. When he came back again I took the matter up, and he gave me a price, it was either \$450 or \$500, either one of the two, for towing the two of them, to take either two together or one at a time. I considered, of course, that that was too much, and I told him to think it over and let me know. He said he would consult his owners in the matter, and let me know when he came back, which would be, as near as I can remember, about the middle of August, and he agreed then that he would tow them down for \$400.

Q. You say he agreed; what was the conversation between you?

A. Just a verbal agreement talked of.

Q. What did you say and what did he say when he came back?

A. All that was said was that he would tow them down, instead of \$450 or \$500, he would take them down for \$400, or \$200 apiece.

Q. Under what special conditions, if any, did he say he would do that?

A. Not any, that I remember of.

Q. Did he not say to you at that time that the

(Testimony of Robert Banks.)

barges would be taken down entirely at your risk?

A. No, sir.

Q. You don't recall that?

A. No, sir, I don't recall it.

Q. Are you positive he did not say that to you?

A. I have no recollection of it.

Q. Is that the best you can say, that you have no recollection of it? A. Yes, sir.

Q. You would not undertake to say positively that he did not say [81—10] that?

A. Yes, sir, I am positive, sure.

Q. Did he not also at that time tell you that you would have to supply the hawser, that he had no hawser? A. Not definitely, no, sir.

Q. What did he say about it?

A. He spoke about a line; the question came up, and I think I told him—I am not definitely clear on that, I think I told him he could secure a line from the Simpson Lumber Company, that they had some tow-lines there, and he confirmed that later, that he could.

Q. Did he not tell you that he would not supply the tow-line, and that you would have to supply the tow-line? A. No, sir.

Q. You are positive of that also? A. Yes, sir.

Q. Did you not apply to the Simpson Lumber Company for the tow-line?

A. No, sir. Just a minute, at what date?

Q. I don't know anything about the date, I am asking you if you applied to them at any time for a tow-line for the "Hardy."

(Testimony of Robert Banks.)

A. Not before September 5th.

Q. Did you apply to them September 5th for it?

A. No, sir; not before that.

Q. Do you mean to say that you applied to them at some subsequent time? A. Yes, later.

Q. For the "Hardy"? A. No, sir.

The COURT.—Q. Do I understand, then, that you never applied for a tow-line for this tow?

A. Not till September 5th, no, sir.

Q. I don't just understand what you mean by September 5th.

A. To explain that, I will say that we had the second barge practically ready to tow here, and the "Hardy" on the return trip if she went through all right was to take the second barge for the same party. We built two for the same party. When we got [82—11] notice that the barge was lost, or that the "Hardy" lost the barge, we wanted to arrange to get the second barge to San Francisco; the steamer "Iaqua" was in port. I took the matter up with the captain of the "Iaqua" as to the towing. The captain did not have any tow-line; that was the way the application was made to the Simpson Lumber Company; on about the 8th or 9th we applied to the Simpson Lumber Company for a line to tow the second barge, which we secured from them for that purpose.

Q. Then your application had nothing to do with the towing of the barge that was lost? A. No, sir.

Mr. FRANK.—Q. Were you present in San Francisco, Mr. Banks, when Mr. Rosenthal, who repre-

(Testimony of Robert Banks.)

sented the insurance company here, and Mr. Derby went down to Mr. Simpson's office in San Francisco and interrogated him upon this question?

A. No, sir.

Q. Did you ever speak to Mr. Simpson about it?

A. Which Mr. Simpson?

Q. Mr. Edgar Simpson? A. Yes, sir.

Q. When? A. At North Bend.

Q. How long ago?

A. About the first of the year.

Q. Why did you go to Mr. Simpson to speak to him about it at that time?

A. In reference to a tow-line.

Q. I mean about this tow-line for the "Hardy" and about this dispute. A. Yes.

Q. I say, why did you go to him at that time?

A. Because of a letter in reference to securing the line.

Q. You mean you wrote him a letter?

A. No, there was a letter that came to us about this line.

Q. You mean Simpson wrote you a letter in reference to it? A. No, sir; Mr. Derby.

Q. Mr. Derby wrote you a letter respecting it?

A. Yes, sir. [83—12]

Q. And you went to Simpson? A. Yes, sir.

Q. For what purpose?

A. The letter stated that the information was given him that we secured the line from Simpson, and I interviewed E. M. Simpson personally on the ques-

(Testimony of Robert Banks.)

tion, and he stated that this line was procured by the Captain of the "Hardy."

Q. Who stated that? A. Mr. Simpson.

Q. He did? A. Yes, sir.

Q. Do you know, as a matter of fact, that he has testified just to the contrary; you were present, were you not, when he testified? A. No, sir; I was not.

Q. What did you put a light on her for?

A. That is the custom followed on all towing, to put a light.

Q. It is the custom to have a light, but why did you put it on if you were not taking the risk of that tow?

A. We always do. We always supply a light for every tow. On all the structures we build, we always supply the light for them.

Q. Who furnished the bridle that went on the tow? A. We did.

Q. Who made it fast? A. We did.

Q. Who made the tow-line fast to the tow?

A. Our men shackled it onto the bridle, so far as I know. I was not present at the dock when this was done, but Mr. Kruse was. We had two men on the barge for that purpose, and I think to my best judgment that that was done by our men.

Q. She was a flush-deck barge, was she not?

A. Yes, sir.

Q. That is, she was just flat like a table would be.

A. Just flat like a table, only that the hatches raised about fourteen inches.

Q. And those were in the center?

(Testimony of Robert Banks.)

A. Those were inside, that is, with a coaming raised and battened down.

Q. About how far were these hatches away from the side of the [84—13] vessel?

A. They were about ten feet.

Q. On either side? A. Yes, sir.

Q. And how much freeboard did she have?

A. She had about six feet.

Q. As much as that?

A. Between 5 feet 8 and 6 feet.

Q. On the side of the vessel, what sort of a fender did she have?

A. She had just what we call fore and aft fenders; that would be lengthwise. There was a 4 by 10 plank on the side, one on the top, one on the bottom and one three feet from the top.

Q. Spiked? A. Or bolted.

Q. You mean flush with the deck?

A. Yes, one flush with the deck.

Q. And that made a projection on the side of how much? A. 4 inches.

Q. Of 4 inches? A. Yes, sir.

Q. Did you say there were other fenders on her?

A. There is one 3 feet below that, and then one on the bottom, on the run, as we would call it, on the lower edge.

Q. That is flush with the bottom of the vessel?

A. Flush with the bottom, yes, sir.

Q. You have frequently been in the habit of telephoning to Mr. Falkenstein, of the Simpson Lumber Company, have you not? A. Yes, sir.

(Testimony of Robert Banks.)

Q. Sufficiently for him to recognize your voice and you to recognize his voice over the 'phone?

A. Yes, sir.

Redirect Examination.

Mr. DERBY.—Q. Did you telephone to Mr. Falkenstein with reference to getting this line for the “Hardy”? A. No, sir.

Q. Have you ever been sent any bill for this rope by the Simpson Lumber Company?

A. No, sir. [85—14]

Q. I wish you would explain again what your talk with Captain Simpson was in January.

A. I met Captain Simpson and I asked him what arrangement the Captain of the “Hardy” made with him about the line that he towed this barge with—

Mr. FRANK.—Just excuse me, when is this you are speaking of?

Mr. DERBY.—In January. I am referring to the conversation you brought out. Proceed with your answer.

A. (Continuing.) And Captain Simpson stated that the Captain applied for the line. He furthermore stated that the line had not been returned, and that the “Hardy” would be charged with the line. That is practically the substance of the conversation.

Q. Did you have a telephonic conversation later with Mr. Falkenstein with regard to supplying a line for the second barge? A. Yes, sir.

Q. What was the size of the barge?

A. Which one?

Q. The one that went down with the "Hardy."

A. She was 86 by 36 by 8 feet deep.

[**Testimony of Louis Rosenthal, for Libellant.**]

LOUIS ROSENTHAL, called for the libellant, sworn.

Mr. DERBY.—Q. What is your business?

A. Marine insurance.

Q. How long have you been in that business?

A. 31 years.

Q. Did you have the insurance on the barge of Kruse & Banks that was towed down by the "Hardy"? A. Yes, sir.

Q. When did you first hear that the barge had been lost?

A. I saw it in the "Chronicle" on the morning of September 8th, Monday morning.

Q. What did you do?

A. When I got down to the office, I called up Mr. Davenport, the agent of Kruse & Banks of the [86—15] shipbuilding company, who had placed the insurance, and I asked him what he knew about it, and he said he had already been in communication with the captain, and he expected to see the captain down at the channel where the "Hardy" was discharging. I told him to come up to the office and we would go down in my machine together, and we went down to the "Hardy."

Q. You went down to the "Hardy" that morning? A. Yes, sir.

Q. Did you have any conversation with the master of the "Hardy" with reference to the lost barge?

(Testimony of Louis Rosenthal.)

A. More or less, yes, sir.

Q. Could you state what that conversation was, Mr. Rosenthal?

Mr. FRANK.—What is the purpose of this?

Mr. DERBY.—The purpose is to bring out certain admissions made by the master of the “Hardy”; they may be used against the owner.

Mr. FRANK.—I think I shall enter formal objection to that at this time. I am aware of the fact that under certain circumstances admissions of the master would bind the owner, but my impression is it must be part of the *res gestae*. I may be mistaken about that, and I want to enter the objection upon that ground at the present time.

Mr. DERBY.—It is only when it is other officers than the master that it must be part of the *res gestae*. But the master represents the owner. I have a decision of the Supreme Court of the United States holding that such admissions by the master are admissible.

The COURT.—Of course, the general rule is that no admission by an agent as to a past occurrence is binding on the principal. I don't know how far that rule is applicable here, and for that reason we will take the testimony; its effect will be determined later.

A. We asked the captain of the “Hardy” when he had lost the [87—16] barge, and he said he didn't know, that I think it was the first officer had come and told him that night, about between 12 and one or after one, I have forgotten which, that they seemed

(Testimony of Louis Rosenthal.)

to have lost her tow. We asked him, among other things, whether his light was burning, or during the conversation the fact that his light went out developed, and we asked him why he did not re-light his light.

The COURT.—Q. You mean the light on the barge?

A. The light on the barge; he said he did not consider it necessary, that she was coming along all right.

Mr. DERBY.—Q. Did he say anything about its being too rough to launch a boat to light the light?

A. No, he did not; he simply said he did not think it was necessary, that she was coming along all right.

Q. Did he say anything to you with reference to the search made for the barge by the “Hardy”?

A. Well, yes, he told us he stayed around there until the morning, and for a couple of hours after the fog lifted, and then went about his business.

Q. Did he say anything about the amount of fuel that he had on board?

A. No, not while I was there.

Q. Did you see the rope which was attached to the “Hardy” as a part of the tow-line? A. Yes, sir.

Q. Where was that rope when you saw it?

A. Aft on the deck of the “Hardy.”

Q. What was the condition of that rope?

A. It was unraveled for quite a distance; it seemed to be all a mass of strands, loose strands.

Q. For how long a distance?

A. Oh, it was coiled up; I should say possibly ten

(Testimony of Louis Rosenthal.)

or twelve feet, or possibly more; there seemed to be a great mass of strands there. [88—17]

Q. What did you and Mr. Davenport then do?

A. We came back to the city and I left Mr. Davenport then to go to the National Steamship Company, to see what could be done about getting some assistance to bring the barge in if she could be found.

Q. When did you next hear that the barge was ashore? A. Wednesday morning.

Q. Was Tuesday a holiday?

A. Yes, Tuesday was Admission Day, September 9th.

Q. What did you and Mr. Davenport do when you heard the barge was ashore?

A. We communicated with the Caspar Lumber Company, upon whose property the barge had come ashore, but, getting no satisfaction, we decided to send Captain Pillsbury up.

Q. Captain A. F. Pillsbury?

A. Captain A. F. Pillsbury. We took the matter up and found that the morning train had gone, and that if he went up by the afternoon train he would not get there as quickly as we sent him up by the steamer "Brunswick" in the afternoon, and so we sent him up on the "Brunswick" in the afternoon, and he got there the next morning.

Q. Was it necessary to pay something for the salvage services?

A. Apparently, because there was some amount paid for salvage purposes. Captain Pillsbury telephoned down to me what that figure was, but Mr.

(Testimony of Louis Rosenthal.)

Davenport and I demurred to it as being rather high, and Captain Pillsbury telephoned that he considered it was fortunate to be able to make the contract that he did.

Q. I am not going to bring out the amount of the bill. Money had to be paid for the salvage?

A. Yes, sir.

Q. And money had to be paid for the repairs?

A. Yes, sir; and money had to be paid for getting the barge off and bringing her down. Some money had to be paid to the men who tied her to the rocks there, or who were supposed to. [89—18]

Q. And money had to be paid here for repairs?

A. Yes, sir.

Cross-examination.

Mr. FRANK.—Q. All of that money was paid by the insurance company, was it not?

A. Yes, Mr. Frank, under instructions from Mr. Davenport, agent for Kruse & Banks.

Q. And you paid it on account of your loss; in other words, all of the money that was paid out was paid by the insurance company in acknowledgment of its policy?

A. Sure, it was paid as part of the insurance.

Q. When you were down there talking to Captain Michaelsen, who else was present besides you and Mr. Davenport?

A. I think the first mate and the chief engineer.

Q. Is your recollection clear now that all that the captain said was that he did not think it was necessary, she was coming along all right?

(Testimony of Louis Rosenthal.)

A. That is all he said, yes, sir.

Q. Is your recollection clear on the subject now?

A. Fairly clear, yes, sir.

Q. Don't you know that he made the report at the time and said they could not get alongside to re-light that light?

A. He didn't make any statement of that kind in my presence.

Q. He did not make a statement of that kind in your presence? A. No, sir.

Redirect Examination.

Mr. DERBY.—Q. Did you pay any losses without the approval of Mr. Davenport, the agent of Kruse & Banks? A. No, none.

Q. For whose account were the payments made?

A. They were supposed to be made at that time for the account of Kruse & Banks.

Q. And then you later settled the matter, you adjusted your insurance.

A. Afterwards, yes. [90—19]

[Testimony of J. E. Davenport, for Libellant.]

J. E. DAVENPORT, called for the libellant.
Sworn.

Mr. DERBY.—Q. Mr. Davenport, what is your business? A. Shipping and commission business.

Q. How long have you been in that business?

A. Ten or twelve years.

Q. Do you own a number of steam schooners?

A. Yes, sir.

Q. Do you know the steamer "Hardy"?

(Testimony of J. E. Davenport.)

A. I do.

Q. Did you have anything to do with this barge that was supposed to be towed down here by the steamer "Hardy" in September, 1913?

A. Yes, sir; in the first place, I was to attend to the insurance and then to see that she was delivered to Henry Peterson.

Q. Were you the agent here for Krews and Banks, the libellants in this case? A. Yes, sir.

Q. When did you first hear of the barge's loss?

A. On the morning of September 8th, in the "Chronicle."

Q. What did you do?

A. I came over to the office and when I did there was a call in there from Captain Michaelsen, he called up the office. I had not got over from Oakland at that time. I immediately called him up and he commenced to tell me about the affair, and I told him I would come right down to the ship and see him if he would be there all the morning, and he said he would be there all the morning. And so I went down there about between 11 and 12 o'clock.

Q. Did anyone go with you?

A. Yes, sir, Mr. Rosenthal. We went down in his machine.

Q. Did you have a talk with the captain of the "Hardy" on board the "Hardy" on that morning?

A. Yes, sir.

Q. State, as near as you can, what the conversation was.

(Testimony of J. E. Davenport.)

Mr. FRANK.—That is subject to the same objection. [91—20]

The COURT.—Yes.

A. I asked to see the line and we went back to see the line on the after part of the deck.

Mr. DERBY.—Q. First, tell me what was the condition of the line?

A. The line was very badly frayed out, about 12 or 14 feet, fagged ends and frayed out. It had the appearance of being towed in the water a very long time before it was hauled aboard the ship.

Q. Are you familiar with the different conditions of hawsers? A. Yes, sir.

Q. And the unraveling would indicate it had been towed in the water for some time? A. Yes, sir.

Q. Now, please state what your conversation with the master of the “Hardy” was.

A. I asked the captain what time he lost his tow and he said it was after the watch had been changed at midnight, and the officer of the deck came to his room and stated that he thought he had lost the tow; that was about three-quarters of an hour after the watch had changed at midnight, between 12:45 and 1 o'clock; he said he immediately went aft and pulled the hawser in and found that he had lost the tow. In his report in the paper it stated that the barge was adrift and did not have any light on the barge, and it was a menace to navigation, and he wanted to report by wireless to that effect, that it was in the track of vessels. I asked the captain what time the light went out, and he said it went

(Testimony of J. E. Davenport.)

out the first night. I said, "Why didn't you light the light"; I said, "Did you tow that boat down the following day without lighting the light"? He said, "I didn't want to lower my working boat, she was coming along all right anyhow."

Q. Did he say anything about its being too rough to lower a boat? [92—21] A. No, sir, not at all.

Q. Did you have any subsequent conversation with the master of the "Hardy"?

A. Yes, sir, I did on the morning of the 10th. The captain brought in a copy of his notice of protest. In reading it I noticed he said he was short of fuel oil. I said, "Do you mean to say, Captain, you would start with a tow and only have sufficient fuel oil to bring the vessel in under most favorable circumstances and without any delay"? He said, "Oh, that part of it is all right, we had oil enough."

Q. Did he tell you why he put in his report the statement that he had not sufficient oil?

A. No, I don't recall that.

Q. Did you have any conversation with the captain with reference to the lookout on the "Hardy"?

A. Yes, I asked him if he had a man aft watching the hawser, and he said he did not, he didn't have any lookout only the man on the bridge. He had no man aft whatever to watch the line. I told him that was a very careless piece of work, I considered it.

Q. What did you do after you left the "Hardy," with reference to this barge?

A. I stopped at the National Steamship Com-

(Testimony of J. E. Davenport.)

pany's office to see if they would telephone up to their mill to have a launch go out and search for the barge, as the captain had told us the place the barge had gone adrift was to the northward and pretty well offshore Fort Bragg. I asked them if they would telephone up and send a launch out to scour the coast there and I would see that any reasonable bill would be paid, as I was representing Krews and Banks and they were reliable, and I would see that the bills were paid, and we wished to get the barge and secure her before she would go on the rocks or ashore.

Q. There is no need to relate the conversation. I just wanted [93—22] you to state the efforts you made.

A. Then the night intervened, and I went again on the morning of the 9th, and we learned that the barge had come ashore at Caspar and we wanted to see if they would send a launch down to Caspar and get the barge and bring her back with one of their own vessels. Mr. Johnson stated that as the barge was on the Caspar property, there might be some salvage claims, and he didn't like to interfere, and suggested that I take it up with the Caspar Lumber Company. I did that. I telephoned later to the Caspar Lumber Company, but could not get any satisfaction from them and then we concluded to send up Captain Pillsbury.

Q. Was Captain Pillsbury sent up with your approval, as agent for Kruse and Banks?

(Testimony of J. E. Davenport.)

A. Yes, sir.

Q. And I understand you approved these different bills that were paid by Mr. Rosenthal?

A. Yes, sir.

Cross-examination.

Mr. FRANK.—Q. When you speak of the line appearing to have been towed in the water some time before taken aboard the vessel, you are referring to its condition after the tow parted?

A. Well, the line was parted, and it was coiled on the aft part of the vessel; the aft part of the line was very badly frayed out.

Q. And when you say it was towed in the water, you mean it was towed in the water after the barge was lost?

A. After the barge was lost; I should say it was towed in the water about an hour or an hour and a half to be in that condition.

Q. That is a matter of surmise on your part, it is not?

A. No, sir, it is from experience. I have seen hawsers in the water. [94—23]

Q. Where did you have that experience?

A. On the coast, on this coast.

Q. Are you a seaman?

A. I have been around the water a great deal. I have not any papers. I have had a great deal of experience with vessels, and around vessels, and construction.

Q. In what way?

(Testimony of J. E. Davenport.)

A. In operating them, and as agent for them, and so forth.

Q. When you say operating, you mean operating them on land?

A. In wharf construction I have seen pieces of line overboard and threshing around in the surf and around in the water.

Q. But you have had no experience whatsoever on board ships with a vessel towing, of a towline dragging, or anything of that sort?

A. No, sir, I have not had any of that experience.

[Testimony of A. F. Pillsbury, for Libellant.]

A. F. PILLSBURY, called for Libellant, sworn.

Mr. DERBY.—Q. Captain, what is your occupation? A. Marine surveyor.

Q. How long have you been in that business?

A. More than 11 years.

Q. Are you also a master mariner? A. Yes, sir.

Q. Do you remember being employed by Mr. Rosenthal and Mr. Davenport to go up and attend to the salvage of the barge which was stranded, Captain? A. I do.

Q. When were you employed?

A. On the forenoon of Wednesday, the 10th of September.

Q. When did you go up?

A. I left on the steamer "Brunswick" the same afternoon.

Q. Was that the quickest way you would get there? **[95—24]**

(Testimony of A. F. Pillsbury.)

A. That was the best opportunity.

Q. After you got there what did you do, Captain?

A. First, I consulted with the wharf agent of the Union Lumber Company at Fort Bragg, where the "Brunswick" landed; Mr. Robeck, is the name of the superintendent, I think. I asked him what facilities there were there for pulling this barge off. It resulted in his going down to the wreck with me. I also learned from him that Captain Hammer was at Mendocino to take charge of the loading of a sailing vessel there. Captain Hammer, by the way, is a captain for the Union Lumber Company, a port captain, and has had charge of picking up moorings, not only for the Union Lumber Company but also for quite a number of other lumber companies that have outside landings; he has had a lot of experience on that coast. When I learned that he was in Mendocino, I got him on the telephone and asked him to come up and meet us at Caspar and look the situation over and see what arrangement could be made toward pulling her off.

Mr. FRANK.—Just a moment. I don't understand what this dissertation has to do with this case. They picked her up and repaired her, I suppose.

Mr. DERBY.—Q. Where did you find the barge?

A. I found the barge in a cove about three-quarters of a mile northwest of Caspar entrance.

Q. Was she on the rocks?

A. She was on the rocks.

Q. Was she damaged? A. Yes, sir.

(Testimony of A. F. Pillsbury.)

Q. Did you arrange with the "Brunswick" to haul her off?

A. I did, or rather, I arranged with the Union Lumber Company, that they would send the "Brunswick."

Q. And was she hauled off by the "Brunswick"?

A. She was.

Q. Was there any other assistance available, Captain? [96—25]

A. I was not able to find any. I inquired of the manager of the Caspar Lumber Company, and he said they could not attend to it, that they had no facilities there for doing the work.

Q. What was the arrangement for salvage?

A. The arrangement was that for the sum of \$1000 the Union Lumber Company would undertake with their steamer "Brunswick" to tow the barge off and deliver her to San Francisco.

Q. Do you mean the Union Lumber Company or the National Steamship Company?

A. Well, they are pretty much the same, the National Steamship Company I suppose is the correct term. If they got the barge here safely they were to receive \$1000. If they made the attempt and either got the barge off or did not get her off, or got her off and lost her on the way down, they were to get \$200.

Q. Was that the best arrangement you could make, Captain?

A. That was the best arrangement I could make.

(Testimony of A. F. Pillsbury.)

Q. Did you consider it a reasonable arrangement?

A. Yes, under the circumstances.

Q. What were the circumstances?

A. The vessel was in a rocky cove. On the morning I got there there were heavy breakers outside, nearly 1000 feet out, through which it was dangerous at that time to send a boat, and she would have to be dragged off about 1000 feet before she would be in clear water.

Q. Did the "Brunswick" have to give up any other business in order to attend to the salvage?

A. She left Fort Bragg early in the morning and was down there about seven, I think she got back about noon of the same day.

Q. Was the barge subsequently towed by the "Brunswick" to San Francisco?

A. After the barge was floated she was towed into Fort Bragg, and waited until the "Brunswick" had completed [97—26] her cargo, and then was towed to San Francisco by the "Brunswick."

Q. Was the salvage and the towage in your opinion performed in the proper manner?

A. Yes, sir.

Q. With due care? A. Yes.

Q. What happened to the barge after she reached San Francisco?

A. She was tied up at the seawall and Henry Peterson, the man for whom she was built, was notified to send a watchman and a light and look out for her, which he agreed to do.

Q. Did you see the barge later, in the repair yards,

(Testimony of A. F. Pillsbury.)

Captain? A. Yes, sir.

Q. Did you make a survey? A. I did.

Mr. FRANK.—Are we going into the question of damages? The testimony of the witness has been wholly to the point of damages.

Mr. DERBY.—I think not. I have only one more question.

Q. Captain, have you a chart with you?

A. I have. (Producing.)

Q. What is that chart?

A. A chart of the coast of California; from Cape Mendocino to Point Arena.

Q. Will you mark on that chart, Captain, a point twenty-five miles from Point Gorda and fourteen miles offshore.

Your Honor, that is where the master's report says the barge was lost.

Q. Have you fixed the point, Captain?

A. Yes, sir, I have marked it with a cross.

Q. Can you identify on that chart the point in latitude north 39-45, and longitude west 124-10? Will you mark that point A?

A. Which one, the first or the second?

Q. The second one. A. All right.

Q. Captain, presuming the barge to have gone adrift at the point you have marked with a cross, at about 12:30 the night [98—27] before, would it be reasonable to expect her, at 8:00 A. M. in the morning to be at the point marked A?

A. Depending upon the weather.

(Testimony of A. F. Pillsbury.)

Q. Is that point in the usual fairway of vessels?

A. Yes, sir, I should think just about.

Q. Both going up and coming down the coast?

A. Yes, sir.

Mr. DERBY.—I offer the chart in evidence, and ask that it be marked “Libellants’ Exhibit B.” I have an “Exhibit A” already. That is all.

Cross-examination.

Mr. FRANK.—Q. Where is Fort Bragg?

A. Right here (pointing),

Q. Where is the cove in which you found the barge?

A. It is very hard to explain that here, there are so many coves there. It is about three-quarters of a mile up the coast from Caspar entract.

Q. Just mark that point B, please, where you found the barge.

A. I cannot say just exactly where it is.

Q. These lines you have drawn here are for the purpose of establishing the various points you have been asked about, are they not? A. I presume so.

Q. Didn’t you draw them? A. Yes.

Q. Then you know, don’t you? That is what you estimate to be the drift of that barge, A-B?

A. Yes.

Q. What distance is that; just measure it off on the chart?

A. About $27\frac{3}{4}$ miles; that is, from A.

Q. Now measure the distance from the cross.

A. That is just slightly over 7 miles.

(Testimony of A. F. Pillsbury.)

Q. So it would be about 35 miles from that point to the point where you picked her up?

A. Yes, sir. [99—28]

Q. What date was it you picked her up, Captain?

A. Do you mean what date did I get to Fort Bragg?

Q. Oh, yes, that is so; you don't know how soon she came in there. A. No, sir.

Q. You had no means of finding out how soon she got in there?

A. I did ask, but I don't remember it, Mr. Frank.

Q. What date was it you got up there?

A. I got up there on Thursday morning, the 11th.

Q. When you found her in there, was she moored in any way?

A. No, sir. The men who first saw her saw her come in, I believe, on a calm day, and tried to moor her to one of the outlying rocks and the line parted and she came into this little cove or indentation.

Q. Did you meet those men? A. Yes.

Q. Did you ascertain *that* day that was?

A. I did.

Q. What day did they say they saw her coming in? A. My recollection is it was Monday.

Q. What date was that?

A. That would be the 8th.

Q. What day was that?

A. That would be Monday, I believe.

Q. And what year was it? A. 1913, last year.

Q. What did you say was the condition of the

(Testimony of A. F. Pillsbury.)

weather when you went in there with the "Brunswick"? A. I don't think I testified to it.

Q. You said something about breakers, did you?

A. I said the day I got there there were quite heavy breakers. The "Brunswick" did not get there until the next morning.

Q. How was it then, what was the condition then?

A. It was quite reasonably smooth then, so that they got in without any danger.

Q. They got in without any danger?

A. Yes. [100—29]

Q. How near could they go to the barge?

A. I think they went within 40 or 50 feet so that they could throw a heave line.

Q. So there was no difficulty in making fast to the barge, at all?

A. Not that day, not any great difficulty.

Q. How long were they towing on her to tow her out?

Mr. DERBY.—I submit that this bears on the question of damages, and not on the question of liability.

Mr. FRANK.—This gentleman was asked how much he paid, and whether it was a reasonable charge.

Mr. DERBY.—I only wanted to establish the general fact.

Mr. FRANK.—I would be only too glad to defer this, but while I am at it I think I had better finish it. I will say, though, that the captain will have to be called again on the question of damages.

(Testimony of A. F. Pillsbury.)

Mr. FRANK.—I will finish with this now, as long as the Captain started with it.

A. In getting her afloat, I think about an hour.

Q. After she was got afloat, where was she taken?

A. To Fort Bragg.

Q. Did they have any special difficulty in taking her? A. No, sir.

Q. How did she ride on the water, was she water-logged?

A. She was filling all the time from the time she began to float that morning.

Q. Rapidly or otherwise?

A. Not very rapidly.

Q. Then she did not suffer very much damage on the rocks?

A. She suffered all her damage on the rocks.

Q. All the damage she suffered, but it was not very great, was it?

A. Yes, it was all the damage that was suffered by the barge.

Q. Did she have a hole in her? A. Yes.

Q. Did she have compartments?

A. Yes, sir, she had compartments. [101—30]

Q. So that this hole was only in one compartment?

A. Yes.

Q. After they got her to Fort Bragg and they loaded the "Brunswick" and then took her in tow and towed her down here: Is that right?

A. Yes, sir.

Q. No difficulty in doing that?

A. Yes, some difficulty.

(Testimony of A. F. Pillsbury.)

Q. Were you on board?

A. I was on the "Brunswick."

Q. What was the difficulty? A. Heavy seas.

Q. Is that all? A. She broke adrift.

Q. She broke adrift, did she? A. Yes, sir.

Q. Where did she break adrift?

A. The location?

Q. Yes; how long after she had started out?

A. She broke adrift the next morning, I think we were ten or fifteen miles northwest of Point Reyes.

Q. How long did it take to pick her up?

A. I should think two hours.

Q. What was the matter, did the line part?

A. The wire pennant parted.

Q. Where did it part?

A. I don't know just what particular part of the pennant parted.

Q. I mean, did it part next to the "Brunswick" or next to the tow, or in the center, or where?

A. The barge had a pennant leading from each corner—

Q. Oh, yes, I understand, you mean the bridle.

A. Yes, and this wire forming the bridle or pennant parted. The "Brunswick" furnished her own towing-line.

Q. One pennant parted and one pennant held, did it?

A. No, sir; it was one piece, as I remember, seized together, and first one side parted and then about an hour afterwards the other side parted. The barge

(Testimony of A. F. Pillsbury.)

had of course water-logged and [102—31] sheared heavily in the heavy swells running.

Q. It was a following sea, was it not, and a following wind? A. Yes.

Q. And about what force wind was it?

A. Between 8 and 9.

Q. How long had that continued?

A. The wind began to breeze up at sundown that night, and for a few hours it blew quite strong and in the morning it had moderated.

Q. That is the usual northwest wind that you expect in that season of the year along that coast, is it not?

A. You may expect it at any time, yes, sir.

Q. There was nothing extraordinary about it, was there? A. No, sir.

Redirect Examination.

Mr. DERBY.—Q. Did the wind make the towing any easier, Captain, a following wind?

A. A following wind makes it usually more difficult in towing anything.

Q. And I understand that the barge was water-logged? A. Yes, sir.

Recross-examination.

Mr. FRANK.—Q. If she had not been water-logged, she would have jumped about just the same or perhaps worse, would she not?

A. She would not have had the weight.

Q. She would not have had so much weight, but she would have had the whole weight of the barge,

(Testimony of A. F. Pillsbury.)

and she would have been livelier and would have jumped more?

A. I think not, because she would only weigh about one-third floating than she would waterlogged.

Q. But leaving out the weight, she would have jumped about more *lively* than she did when she was deep-seated in the water, because she was waterlogged?

A. No, I don't know that I agree with you there.

[103—32]

Mr. DERBY.—That is our case, if the Court please.

Mr. FRANK.—Now, if your Honor please, we will introduce in evidence the depositions of Mr. Falkenstein and Mr. Edgar Simpson. So that your Honor may have the benefit of that testimony in connection with the oral testimony introduced, I will read them.

Mr. DERBY.—I am perfectly willing to waive the reading of them.

Mr. FRANK.—I want to read them for my own purpose. (Reads.)

[Testimony of Hans Michaelsen, for Respondent.]

HANS MICHAELSEN, called for the Respondent, sworn.

Mr. FRANK.—Before I examine the Captain, if your Honor please, I want to call attention to the interrogatories attached to the libel and the answers thereto.

(Testimony of Hans Michaelsen.)

Mr. DERBY.—Are you offering these as evidence, Mr. Frank?

Mr. FRANK.—Certainly I am.

Mr. DERBY.—I submit, if your Honor please, that while I can use the answers to the interrogatories, he cannot. They are self-serving declarations so far as he is concerned.

Mr. FRANK.—They are not self-serving declarations, any more than when you ask him certain questions on the witness-stand, you might say that his answers are self-serving.

Mr. DERBY.—I submit that they are inadmissible on the part of the respondent. I have no objection to Mr. Frank reading these to the court, but he is not entitled to offer them in evidence.

Mr. FRANK.—I know that the question is controverted, if your Honor please, but I do not think it is settled that they cannot be used, and in principle I do not see why they cannot be used.

The COURT.—Except on the ground that they are self-serving [104—33] declarations.

Mr. FRANK.—They are answers to questions asked by the libellant.

The COURT.—But he is not under oath.

Mr. DERBY.—They are really answered by Messrs. Frank and Frank, and they are not under oath.

The COURT.—I do not think it is necessary to answer them under oath. On principle it seems to me they are admissible, perhaps, against the man who makes them.

(Testimony of Hans Michaelson.)

Mr. FRANK.—They are under oath, because they are a part of the answer; they would be of no value if they were not under oath. The answer is verified.

Mr. DERBY.—I have no objection to Mr. Frank reading them, but I certainly object to their being offered in evidence.

Mr. FRANK.—Well, we can discuss the matter afterwards. I take the position that I offer them as evidence.

The COURT.—My impression is they are not admissible in your favor.

Mr. FRANK.—Does your Honor wish to make a ruling on that point?

The COURT.—No, I do not want to foreclose you. You can read them and if they are admissible you will have them in the record.

Mr. FRANK.—Very well, your Honor. (Reads.)
[105—34]

Q. Captain, what is your name?

A. Hans Michaelson.

Q. You were master of the “Hardy” at the time in question, were you not? A. Yes, sir.

Q. Before you took the tow, what, if any, conversations did you have with Mr. Banks upon the subject?

A. Mr. Banks was to furnish everything, tow-lines and lights and everything.

Q. Just give the conversation, so far as you can remember it, that led up to that conclusion or agreement that you speak of; how did he approach you, what did he do and say, and what did you do and say?

(Testimony of Hans Michaelsen.)

A. Well, the first we spoke of it was about three trips before; we made three trips I think while he was building the barge. He asked me how much I would charge him for towing down two barges, and at that time I told him I did not know for sure how much I would charge, and I said I would let him know later. I saw Mr. Banks up there every trip I was up there, and the following trip I told Mr. Banks that if he would furnish everything, I would tow them down for \$600. Mr. Banks told me that was too much, he thought that was too much. Well, I told him, "I don't care, because I am going to no trouble to get a tow-line, because I am not in the towing business, and I have got no tow-line." So he said he could get a tow-line from Mr. Simpson—Mr. Banks did. We verbally agreed that I would tow the two barges, either take two or the one, and I said to Mr. Banks, "We will charge \$500, you can count \$300 for the first one and \$200 for the small one, or else \$250 apiece to tow them down," and he was to furnish the tow-line, to get the tow-line from Simpson and furnish the lights and everything. [106—35]

Q. What, if anything, was said about who should take the risk of the tow?

A. I told Mr. Banks that I would take no chances or no risks on that towing. I told him I would do my best and try to get it down, but I would take no risk on it.

Q. After that conversation, what, if any, reply did he make to those suggestions of yours?

(Testimony of Hans Michaelsen.)

A. He said it will be all right, "I will pay you that, and it will be all right, so you tow the barges down then." And so I said "All right," and we let it go at that.

Q. Did you have any subsequent conversation with Mr. Edgar Simpson about that tow-line?

A. When I came up I met Edgar Simpson on the same trip that I was going to tow it down, and I said to Edgar, I asked Edgar Simpson, "Are there going to be any charges against me on that tow-line for Kruse and Banks, and he said "No, if there is anything to be charged it will be up against the shipyard of Kruse and Banks," and I said "All right, that is all I want to know, because I have nothing to do with the tow-line."

Q. And then did you take the tow-line?

A. I went down and took the tow-line and put it on the steamer "Hardy."

Q. After you had been loaded, and were ready to go to sea, who made the tow fast?

A. Two men from the Kruse & Banks yard and Mr. Kruse was superintending the work with the help of some of my crew; they connected the hawser to the bridle. The bridle was all completed, and the light was lighted when I came down there, and the barge was lying alongside of the wharf.

Q. After you had started down and got on the bar, what, if anything, happened?

A. The light went out when we were crossing the bar, on the outer edge of the bar. [107—36]

Q. On the outer edge of the bar? A. Yes.

(Testimony of Hans Michaelson.)

Q. When you arrived at that point, could you have turned around and gone back into the inner bay?

A. No, sir.

Q. Why not? A. We would lose the ship.

Q. Detail the reasons why?

A. The tide was just commencing to ebb already and there was just enough water for me to get out on top high water; against an ebb tide, I could not get in with that ship, I would hammer the bottom out of it. I could feel the bottom of the bar as I went out, once I felt the bottom.

Q. In other words, it is a shallow bar, and just enough to carry you over with top high water?

A. Yes, sir.

Q. And it would not have been safe for you to return at that time?

Mr. DERBY.—I submit, Mr. Frank, that you should not lead the witness.

Mr. FRANK.—I am not. I am simply repeating what he said.

Q. What time of day was that, Captain?

A. We crossed the bar at six o'clock, about six or six fifteen.

Q. And how was it with reference to growing darkness or otherwise? A. What is that?

Q. How was it with reference to daylight?

A. It was just getting dark when I got to the whistling-buoy. I was clear outside about a few minutes to seven, and it was setting in dark.

Q. Why did you not at that time launch a boat and relight the light?

(Testimony of Hans Michaelson.)

A. Well, the wind was too swift and the sea was too strong and night-time was setting in, it was getting dark. By the time I got clear offshore in safety with my vessel, it was dark, and it was not fit to lower a boat to board that barge, it was not fit to board the barge in safety.

Q. Generally, whether it was dark or daylight, what would be the danger of attempting to board that barge with the sea running? [108—37]

A. Well, there would be the danger of drowning some of the boatmen.

Q. Explain in detail, if you can, how the barge acts on the sea, with a small boat coming alongside of her?

A. It is a flush-bottom barge, and with a strong northwest sea running, it will come up on top of one sea and it will roll over and set right down; if you are down in the sea, she is liable to roll half way over you and list over you; she was flush, and if she hits you you go out, there is nothing to hold fast to. There is no chance at all. She would smash a little boat up and drown the men. They would be in danger. In my judgment, I would not put any man out to face that barge in that way, and I didn't think I should try to drown any of the men to get a light on the barge.

Q. Was there anybody on the barge to receive a line, or anything of that sort?

A. No, sir, nobody was on the barge.

Q. What were the conditions the following day: Did you go through the next day?

(Testimony of Hans Michaelsen.)

A. Yes, we went all day.

The wind was increasing as we came along, and the sea was increasing; there was a strong northwest wind and sea.

Q. You heard what Mr. Rosenthal and Mr. Davenport had to say about what you said to them concerning the light?

A. Yes, I heard what they said.

Q. What, if anything, have you to say about that testimony and that conversation?

A. I told Mr. Davenport that the weather did not permit me to relight the light, that was why I did not have it lit. Mr. Davenport knows very well I told him so. The mate and the chief engineer stood on the poop when I told Mr. Rosenthal the same thing, that the weather did not permit us to relight the light. If I had any chance to re-light her, I would certainly have re-lit her in safety to myself, but I did not want to drown anybody to re-light the light; I would not permit [109—38] anybody to do that.

Q. Now, Captain, on the way down, what if any watch did you have set on that barge?

A. As usual; we had the usual men, besides an extra man on the poop looking out for the tow, especially as we had no light. I left orders to the men on the bridge to blow a danger whistle if anything approached us from the stern, and in addition I hung up an anchor-light, or what we call a riding-light, on the main boomaloft to attract attention to keep away. That is the next best thing we could do under the cir-

(Testimony of Hans Michaelson.)

cumstances, because I could not get a chance to get to the barge.

Q. This poop-deck that you speak of, where you had a watch on the barge, that is on the stern of the vessel, is it? A. Yes, sir.

Q. And besides that you had your regular watch on the ship? A. Yes, sir.

Q. Was there a watch on that poop at the time that you lost her? A. Yes.

Q. I presume you were not on deck at that time, were you?

A. I went below at ten o'clock. I went to bed at ten o'clock at night, and left my order as usual, to keep a good lookout for the tow and the ship and the steering, and to let me know if anything occurred.

Q. The first you knew of it was when a report was brought to you?

A. The first report I got, was at twelve o'clock; the second officer reported at twelve o'clock that everything was fine, that the sea and wind were about the same, and that the tow was there, and everything was O. K. At 12:40 the first mate came and called me and said that we had lost the tow. It was a very dark and cloudy night. He was looking for a few minutes, between [110—39] him and the man that was aft looking out; he said he was looking for a couple of minutes, he felt sure that there was no barge behind us, because he could not see the foam, and he came right and called me, and he said he felt satisfied we lost the tow.

Q. What did you do then?

(Testimony of Hans Michaelson.)

A. I got right up on deck. I was up on the bridge in five minutes. When he called me, I ordered him to call all hands out and get the hawser in. When I came up the crew was aft getting ready to get the hawser in. I slowed my vessel down to half speed until we got the hawser in, so that there was no danger of getting it in my wheel. I hove the ship around; we could not get around rapidly as there was a heavy sea running. I headed her in one point inside the regular course and lay in to the northward until daylight, and figured on going northward and then coming south, and expected to get her in the morning when daylight set in. But when daylight set in it was foggy.

Q. What did you do?

A. I kept on under slow bell, out and in about a point, searching; all were on watch. I was up in the rigging with the glasses looking around, and we were all watching and looking, trying to discover the barge, but we were not able to pick her up on account of the fog.

Q. How long did you keep that up?

A. Kept that up until 11:15.

Q. That is, the next day?

A. That would be the same day.

Q. As I understand it, Captain, the report came to you a little after twelve o'clock midnight and you kept searching for her until eleven o'clock, near noon on the same day, as you call the time according to sea time? A. Yes, sir.

Q. Did you sight any vessels during the time you

(Testimony of Hans Michaelson.)

were making this search?

A. I sighted what we thought was the nearest we could see in the haze—we thought it was the steamer “Watson.” [111—40]

Q. At the time you sighted her, what was the condition of the atmosphere?

A. At the time I sighted her it was hazy. I could see then about two miles. I judge I could see about two miles.

Q. What direction was she from you?

A. She was on my port quarter. She was, I should judge, about one mile inshore of me and about a mile and a half or two miles astern of me, on my port quarter.

Q. Did you make any effort to attract her attention?

A. No, she was too far, I could not reach her. My whistle she could not hear, and she was speedier than my vessel, and I had no way of reaching her, and so I didn't make any attempt.

Q. After that, what did you do?

A. We were keeping on searching. We saw her, I think, at about 8:30.

Q. Before we leave this other subject, Captain, what is the difference in seeing a vessel like the “Watson” at sea and seeing a barge the kind that you had in tow at sea?

A. It is harder to see the barge; she lays in between the swells; she had about four or five feet, about five feet, perhaps, free-board. A little distance from you in the sea she would be very hard to

(Testimony of Hans Michaelsen.)

pick up. Sometimes you will only see the masts of a vessel, and you will not see the hull at all; sometimes you can see the upper works, and you can hardly distinguish at all what vessel she is.

Q. What kind of upper works did the "Watson" have with reference to color?

A. She had white painted houses. The "Watson" was about a mile inside of me, I should judge, when she passed. I saw the whole side of the vessel I guess only for about five minutes, and then she was out of sight.

Q. Did you meet any other vessels coming down?

A. In the evening off Point Arena, I met the steamer "Beaver." [112—41]

Q. Did you communicate with her?

A. I hailed the steamer "Beaver" with my whistle, and asked him to flash a wireless to notify steamers of the barge that was adrift with no light on and maybe she was a menace to navigation, and I asked him to notify the owners in San Francisco.

Q. Why was it, Captain, you ceased searching for her at eleven o'clock the next day?

A. I gave up searching to feel satisfied of bringing my vessel into port with the balance of my fuel oil, that is, without any danger or any salvage on the vessel.

Q. When you got into port, did you sound to ascertain what fuel oil you had?

A. I had just about twenty barrels, twenty-one or twenty barrels.

Q. So far as available oil for navigation is con-

(Testimony of Hans Michaelson.)

cerned, Captain, how much of that was available; that is, how far does the pump go down, how far will it suck?

A. I never had less than 30 barrels coming into port, twenty-five or thirty barrels is the nearest I have been to the bottom of the tanks since I got the ship, and I judge you could use some more of that, I judge you could pump down to about five barrels in the tanks.

Q. That would leave you about fifteen barrels?

A. Yes, sir.

Q. In your judgment, would it be safe to take any chances out at sea in coming in with a margin less than that? A. No, sir.

Q. You heard what Mr. Davenport said about his conversation with you upon the subject of fuel oil when he asked you about it and you said that part is all right, we had oil enough?

A. Mr. Davenport did not ask me about what fuel oil I had after losing the barge coming in. He said, "Well," he said, "how should you be short of fuel oil, if you had the barge in tow you would have been short of fuel oil"; then I said, "No, that would be all right, because I had spent ten or eleven hours cruising [113—42] about searching for her and that that used up some of the oil, and at eleven o'clock it was foggy, and if I had to search more I would have to go north again, and then I would have to come back, and I didn't have fuel oil enough to keep on searching for the barge any longer." I told him

(Testimony of Hans Michaelson.)

it would have been all right if I did not lose the barge.

The COURT.—Gentlemen, we will meet at two o'clock. [114—42½]

AFTERNOON SESSION.

HANS MICHAELSEN, recalled.

Mr. FRANK.—You may take the witness, Mr. Derby.

Cross-examination.

Mr. DERBY.—Q. Captain, did you have any experience in towing before you made this trip?

A. Yes, sir.

Q. How much experience?

A. I had experience towing on the government tug "Slocum" for six months.

Q. Had you ever towed barges before?

A. No, sir.

Q. Whene was it you told Mr. Banks that you would take no risks, as you put it?

A. I told Mr. Banks right outside of the office of the Simpson Lumber Company's office up at the mill. We stood right outside the office, the two of us, and talked the thing over.

Q. When was this?

A. I did not note down the date, because we had nothing in writing, but I think it was the trip before I towed the barge.

Q. Was it before or after you made your contract with him?

A. That was at the same time that we agreed; I

(Testimony of Hans Michaelsen.)

think, I am sure it was the trip before that we made the agreement, and that is the time I told Mr. Banks to understand that I was to take no risk at all.

Q. That is, you told Mr. Banks he was to understand that you were to take no risks at all?

A. Yes, sir.

Q. Is that the exact language you used?

A. Yes, sir.

Q. You are sure that was the exact language?

A. Yes, sir.

Q. When you went up there again after the trip with the barge, you asked Captain Simpson if he was going to charge you for the [115—43] tow-line?

A. Yes, sir.

Q. Why did you ask him that?

A. Because he said he was going to get the line, and I wanted to make sure there would be no charges against me, because I was making the price as low as I possibly could to Mr. Banks, because he was furnishing everything.

Q. What did Mr. Simpson have to do with it?

A. Because I promised Mr. Banks I would go down and get the line for him.

Q. You say it was agreed between you and Mr. Banks that he was to furnish the line. I don't see why you had the conversation with Captain Simpson if you were not to pay for the line; that was settled, was it not?

A. Well, my object was to make sure there were to be no charges made against me because I had nothing

(Testimony of Hans Michaelsen.)

written with Mr. Banks, and I was going to make sure.

Q. Didn't you tell Captain Simpson at the time you ordered the line that Kruse & Banks were going to pay for it?

A. I didn't say to Mr. Simpson that anybody was going to pay for it, that Mr. Banks was going to pay for it, no; I didn't know about the arrangement Mr. Banks made with Mr. Simpson. Mr. Banks didn't say to me what arrangements he made with Simpson, we didn't talk about that.

Q. What did you say to Mr. Simpson?

A. I saw Mr. Simpson before I went to get the line.

Q. What did you say to him then?

A. If there was going to be any charges against me for this line, Mr. Simpson.

Q. You say that was at the time you got the line?

A. Before I went down and got the line. When I came in I was up at North Bend.

Q. What did you want to ask him for again after you lost the barge?

A. No, that was before I lost the barge; that was before I got the line. I didn't ask him anything about it afterwards, it was [116—44] before I got the line when I asked him.

Q. Didn't you testify on direct examination that on the trip subsequent to your losing the barge you asked him if you had to pay for the line?

A. Before I took the line.

(Testimony of Hans Michaelsen.)

Q. Didn't you testify on direct examination that after you lost the barge you had a talk with Captain Simpson and you asked him whether you had to pay for the line?

A. No, sir, I did not ask Mr. Simpson.

Q. And if Captain Simpson testified to that himself, that is incorrect, is it?

Mr. FRANK.—I don't understand, Mr. Derby, that either this captain or Captain Simpson so testified. There is no such testimony.

Mr. DERBY.—That is my understanding of it.

Mr. FRANK.—Well, the record will straighten that out.

Mr. DERBY.—Q. When you got this rope, didn't you examine it to see whether it was a good rope?

A. I was right there with the sailors when we coiled it up and brought it from the office down to the ship, I was right there.

Q. Didn't you examine the rope to see whether it was a good one?

A. As we coiled it up, we could see every part of it, and it looked satisfactory to me to tow that barge; in my mind it looked good enough to do that towing.

Q. Did you know that rope was an old rope?

A. I knew the rope had been used, but I did not know how much it was used.

Q. You were satisfied it was a perfectly good rope for that tow? A. Yes, sir.

Q. Now, Captain, what time did you start out on your voyage?

(Testimony of Hans Michaelsen.)

A. At five o'clock P. M. on September 5th, with the barge in tow.

Q. And the light went out at 6:15 P. M.?

A. About 6:15 P. M., [117—45] just as we crossed on the outer edge of the bar.

Q. How much speed did the "Hardy" make on that voyage with the barge, how many knots per hour?

A. She averaged about seven and three-quarters, between seven and three-quarters and eight.

Q. With the barge in tow?

A. With the barge in tow.

Q. How does she run without the barge?

A. About eight and three-quarters or nine miles an hour, that is, with steaming. If I have a fresh wind like I had, a strong northwest wind, generally I have the sails on and sometimes she makes nine and a half to ten with the wind.

Q. There is only that little difference between her going alone and going with the tow?

A. Yes, there was only that difference with the tow.

Q. Now, Captain, you go slower inside Coos Bay, do you not, than you go outside?

A. Sometimes I do it is according to the tide. I have to cross the bar at high water. That is the government rules and regulations. I must get out on high water. Sometimes we hurry up.

Q. Don't you have to be careful about the shoals there?

(Testimony of Hans Michaelsen.)

A. Well, I am acquainted with that channel pretty well. I have a pilot's license for that channel. I have been running there two years, and I know it pretty well.

Q. How long did it take to run out on this last voyage?

A. From the Portland Mill to the bar it took about an hour and five minutes.

Q. I am speaking of this very last voyage that you made. You arrived in San Francisco on Sunday, did you not?

A. Oh, you are speaking about the last voyage?

Q. Yes. How long did it take you on the last voyage to go out?

A. I got down the bay, this time it took me—it is different [118—46] time, sometimes I take an hour and three-quarters, sometimes an hour and a half, sometimes an hour. Sometimes I go down with the beginning of the flood, sometimes I come down half speed to get ready to correspond with the tide on the bar.

Q. Don't you always go down at half speed?

A. No. Sometimes I go down the flats there, if there is nothing in the way, I go down at full speed.

Q. You think it is a prudent thing to go down Coos Bay at full speed, you think that is a prudent thing to do? A. Yes.

Q. Now tell me how long it took you this last time to go down?

A. Well, I don't remember exactly; I could tell if I had the log-book with me.

(Testimony of Hans Michaelsen.)

Q. It took you about an hour and three-quarters, did it not?

A. About an hour and a half, I should think, this time.

Q. Is this your log, Captain (handing)?

A. Yes.

Q. Do you keep that yourself?

A. No, the officer writes that down on the bridge; I keep no log-book.

Q. How is the sea outside the bar that night, Captain?

A. Well, the sea was moderate when we first came out.

Q. Didn't it continue moderate up to midnight?

A. It was increasing, the sea and the wind increased.

Q. Did it not continue moderate up to midnight?

A. No, it did not continue exactly moderate, because the wind and sea increased as I came out.

Q. You have it entered in your log as moderate sea up to midnight, have you not?

A. It might be entered that way, I don't know. It says, "moderate sea at eight o'clock P. M."

Q. And also at ten and also at eleven and also at twelve?

A. It says "moderate" there, but nothing more about it.

Q. Haven't you ditto marks under "moderate" down to twelve [119—47] o'clock; is not that right? A. They have those marks there, yes.

(Testimony of Hans Michaelsen.)

Q. How was the wind outside that night?

A. Fresh northwest wind.

Q. A moderate wind?

A. Rather fresh; not what you call moderate; it was rather a fresh northwest wind.

Q. It was not heavy?

A. I don't know exactly which way you call it, but it was a fresh northwest wind.

Q. You say it was clear outside until a few minutes of seven?

A. It was clear; the weather was clear outside; the weather was clear all night.

Q. You could see the barge towing behind you all night, could you not?

A. We saw the barge behind.

Q. But you didn't let down a boat to re-light the light on the barge?

A. No; I judged the sea a little heavy and the wind a little too strong to lay around at night-time and try to put men out in the night-time and try to get around that barge. That was the way it appeared to me that night as far as I could see. The way the wind and the sea appeared to me, it was not proper at all to try and get any men to go in a small boat and try to board the barge in the middle of the night in the dark, because it was a dark night.

Q. You had a good working boat, did you not?

A. Yes, I had a good working boat.

Q. Could you not have gone under the lee of the barge in perfect safety?

A. The lee of the barge is just as bad as the

(Testimony of Hans Michaelsen.)

weather side of the barge. There is no keel on this barge. It is not like a vessel. I feel satisfied I could lower a boat on my own vessel and come around to a deep sea vessel, that is, if there were men around who could assist us with a line. But that night when we had to go alongside the barge and get ahold of it [120—48] with your hands, and if you got hold like that you would slip off and if you did that and came up on one of the seas and if you happened to come up on the sea, you would knock over the boat; it does not take much to break over a little row-boat or capsize it.

Q. Your men could all swim, could they not?

A. I never examined them as to that. I am not going to try and risk the men to be swamped out of the boat, because then I am up against the government myself. I am not supposed to go that far. I am supposed to use a sound judgment in those cases. And when it goes that far that those men have to go out and swim, then I am risking their lives, and I am taking chances either that they will drown or make it. They are human beings, you know.

Q. As a matter of fact, you were going along pretty easy with the tow, and you were not worrying much about not having the light, were you?

A. Well, it did not exactly worry me a great deal. I could not go out there, and I felt kind of satisfied the tow was in good condition the way she looked to me.

Q. You were going along perfectly smoothly?

A. No, I could not go perfectly smoothly with a

(Testimony of Hans Michaelsen.)

sea and the wind running behind me. I was running on the sea and the barge was running on the sea.

Q. Was the water washing up on the barge?

A. I could not exactly say whether it was the first night; during the night it is very hard to tell.

Q. How was the weather the next day?

A. The next day the wind was very strong, strong northwest wind and big sea; the sea and the wind increased.

Q. Look at this entry.

Mr. FRANK.—I want to suggest to you, Mr. Derby, that you [121—49] did not read that other entry right.

Mr. DERBY.—Oh, yes, I did.

Mr. FRANK.—No, you were mistaken about it.

Mr. DERBY.—We will go into that later; I want to continue my examination.

Q. Is there anything in this log about there being a heavy sea on September 6th?

A. It says, "Northwest wind and clear," on this page.

Q. Is there anything about a heavy sea?

A. It made no remark about the sea, but I say there was a big sea, and a northwest wind. When the wind is blowing, there must be a sea. Of course, I admit they should have put a remark down there about it.

Q. Could you not have let down a boat at any time on that day to have re-lit that light?

A. No, sir; any time that I saw an opportunity—

Mr. FRANK.—(Intg.) One moment, Captain. I

(Testimony of Hans Michaelsen.)

make an objection to this because I think that line of examination has gone far enough inasmuch as it is proceeding upon a wrong assumption. In this case, it is a question of ordinary care, only. Even if he could have let a boat down on that subsequent day, he is not bound to do so if in his judgment as a shipmaster it would not have been an ordinarily safe matter to do. There is such a thing as doing things that are not proper to be done under the circumstances.

Mr. DERBY.—I submit that if a boat could possibly have been launched to re-light that light it would have been gross negligence to go ahead with that tow without any light on it during the whole of the next night. I submit that the evidence is clearly admissible.

The COURT.—But what bearing has the failure of lighting on [122—50] the case? Has it a bearing on the time they discovered the loss of the tow?

Mr. DERBY.—That is exactly it, your Honor. If she had a light, it certainly would have been discovered by the “Hardy” sooner than it was.

The COURT.—It may be gross negligence to tow a barge without a light so far as the relations of this ship and this tow with other vessels plying up and down the coast were concerned, but what would be gross negligence as against other vessels might not be at all such as regards the safety of the tow itself and the peril that afterwards befell it.

Mr. DERBY.—I submit that it would be, your Honor, for the reason it was one of the precautions

(Testimony of Hans Michaelsen.)

for the saving of this tow, I mean one of the precautions that should have been taken. Hawsers often break on tows; there is no question about that.

The COURT.—I understand that, but do you mean it would be grossly negligent not to put a light on the barge, no matter what the danger attending it might have been?

Mr. DERBY.—Not if it was impossible.

The COURT.—I mean if it was attended by great difficulty and extreme danger.

Mr. DERBY.—If it was attended by great difficulty and extreme danger, I say it was not his duty, but I am trying to show that in this case it was not attended by great difficulty or extreme danger.

The COURT.—The question will be permitted. I gathered from something the captain said it was possible to see this tow so long as it was there by the foam that it threw up in front of it.

Mr. FRANK.—That is the fact, your Honor.
[123—51]

Mr. DERBY.—I am coming to that in a minute or two, your Honor.

Q. You considered that it was too rough during the whole of that day to put down your working boat?

A. Yes, sir.

Q. Do you remember the report you made to the Collector of Customs, Captain, after getting in?

A. I could not tell it word by word. I made it up in a letter.

Q. Did you say anything in your report at all

(Testimony of Hans Michaelsen.)

about having encountered any rough weather on the voyage?

Mr. FRANK.—Show him the report, Mr. Derby, if you have it.

Mr. DERBY.—Very well, I will show it to him.

Mr. FRANK.—The report speaks for itself.

Mr. DERBY.—Q. Captain, here is a copy of the report. (Handing.)

A. Well, I can't see nothing wrong with that report. The law required me to make a report.

Q. You were seeking in that report, were you not, to exonerate yourself from any blame for the loss of the barge?

A. Well, I could not exonerate myself. That would be up to the United States Inspectors to say. I am required to make a report as to just how it happened. That is the way I lost the barge, and I didn't find it. That is why I am supposed to report. If I put too much down there and wanted to exonerate myself, they would want to know what right I had to do that.

Q. During the night you lost the barge, could you see or through the night did you see the foam thrown up?

A. Yes, I saw the barge myself after ten o'clock when I went below.

Q. You say you could see the foam? A. Yes.

The COURT.—Q. Did you say you could see the foam or the barge itself?

A. Yes, I could see the foam and the barge itself.

(Testimony of Hans Michaelsen.)

Mr. DERBY.—Q. You say the weather was clear?

A. Yes, dark but clear. It was that way when I went below at ten o'clock.

Q. Did not the weather continue clear up to the time you lost the barge?

A. I could not tell when I was in bed.

Q. Wasn't the weather clear when you got up?

A. It was dark and cloudy when I got up, it was a very dark night, a strong wind and quite a sea running.

Q. You at once hove in the rope, did you not?

A. Yes, we hove in the rope. That was the first proceeding I had to do, to, get the rope away from the propeller.

Q. In what condition did you find the rope?

A. Well, it was naturally as a rope would be when it was heaving through the water; it must have been I suppose ten minutes from the time I got up to the time I got it in—about fifteen or twenty minutes to get it secured and get it in.

Q. How long was the tow-line?

A. I don't know.

Q. How long was the part of the tow-line that you got in? A. I don't know, I never measured it.

Q. Was it more than 300 feet?

A. 300 feet, yes; I had about 600 feet of line out.

Q. You mean to say that it took you twenty minutes to get 300 feet of line in?

A. On a ten-inch hawser, yes; I call that good work at night-time, working with the capstan.

Q. How did you haul it in?

(Testimony of Hans Michaelsen.)

A. We had to heave it in with the capstan. I call that good work at that time of night, getting the men out of the bunks and to work.

Q. What lights did you have that night?

A. I had the regular running-light, the two mast lights, and the tow-light.

Q. How far could you see with that light on that night?

A. I don't understand the question. [125—53]

Q. How far off could you see? How far off could you see objects on that night?

A. How far off could I see lights on that night, do you mean?

Q. How far off could you see objects?

A. I did not see anything but the sea and wind.

Q. How far off did you see objects?

A. It is pretty hard to say how far I could see on a night like that. We didn't have no lights to see but our own light. Sometimes you imagine you can see five, or six, or seven miles, and you only see two miles. Sometimes you imagine you can only see two miles and you can see five. I would not say how far off I could see. I am not sure of it.

Q. How far off could you see lights?

A. Mast-lights are supposed by the Government laws to be seen five miles. Whether I could see it five miles or not, I don't know.

Q. Captain, what was in this log before this erasure was made, 12:40?

A. This entry here is practically just the same, it means just the same as it is in the official log-book,

(Testimony of Hans Michaelsen.)

only it makes it a little shorter to put this in behind. They left out that we turned around.

Q. They left it out, that you turned around?

A. Yes, sir; left it out in here, but it is in the official log-book.

Q. When were these entries made?

A. All entries are made when you do the work, When you finish with the proceedings, you enter it in the log-book, passing land, or changing your course, or anything like that.

Q. Who made that erasure, who rubbed that out there? A. This here, I rubbed out myself.

Q. Why did you rub it out?

A. To put this in here, as the mate was not there; I did it here; that belongs to it. [126—54]

Mr. FRANK.—Q. Just read what you put in, Captain, so the Court will understand what the change is.

A. Tow-line parted, the ship was hove to at once.

Mr. DERBY.—Q. What was put in before you made the erasure?

A. Tow-line carried away, I guess. The ship was hove to, because the mate can witness it. It was his duty to put it in there. This is what we call a scratch-book.

Q. When did you rub out what was there before?

A. I don't recollect the day, but I guess it was that day coming down. I think the mate was on the watch below.

Q. You mean the next day after this you rubbed this out, and entered it correctly?

(Testimony of Hans Michaelsen.)

A. Yes, I entered it correctly. The mate, I think, was on his watch below, and I didn't call him. He has it in his official log-book.

Q. Did you say, Captain, that immediately on discovering the loss of the barge you hove to, you turned your vessel around?

A. I told you I was in bed at the time we lost the barge.

Q. I mean when you got up on deck. You came up on deck in about five minutes?

A. In about five minutes, yes; I did not exactly time it, but it was about five minutes.

Q. Then you had the boat turned around?

A. I had to get the hawser in first; if I got the rope in the propeller, I was gone myself, I would be under salvage myself, I had to get the hawser in first.

Q. As a matter of fact, Captain, are you sure you turned around at all?

A. Am I sure I turned around?

Q. Yes.

A. Well, I guess I am; I guess I am sure I turned around, yes.

Q. Didn't you proceed ahead for a considerable time because you found you could not turn around because of the height of your [127—55] deck load? A. No, sir.

Q. Are you sure of that?

A. Yes, sir. My log-book shows I turned around; it is entered by the officer on the bridge. The man at the wheel will know it, too. He got his order to turn it around.

(Testimony of Hans Michaelson.)

Q. What did you do?

A. We slowed her down.

Q. How did you proceed?

A. I steered northwest by north, I think, one point inside the regular course going up the coast, because I figured the barge would drift in.

Q. You proceeded in a northerly direction?

A. Yes; that was the only way to do.

Q. There was a northwest wind, was there not?

A. Yes, sir.

Q. The barge would be drifting down, would it not, in a southerly direction?

A. Yes, sir; the barge would be drifting in a southeasterly direction.

Q. What was your purpose in proceeding north?

A. That was the only way I could hold my ship; I didn't want to run it to the southward.

Q. How far did you run that way?

A. I run until daylight. There was no use searching at night for a barge without a light.

Q. You were going dead slow, then, during the night, were you? A. Yes, sir.

Q. You could not burn much fuel oil during that time could you, if you were going dead slow?

A. Well, there was a strong wind. She was going I guess half speed down there. We were making slow headway with the ship. I did not exactly ask the chief how much she registered down there, but she was going near to half speed to hold the steerage way on her. I had to have enough headway to hold

(Testimony of Hans Michaelson.)

steerage way on account of the wind and sea which were quite strong. [128—56]

Q. Then the entry in the log that you were going first dead slow and then slow speed is incorrect; you were going half speed.

A. Well, we were going slow speed, a little half speed. We have no telegraph there, you know, we just have a bell. When I want half speed I give one bell; then if we want anything less than that I whistle down to slow her down more.

Q. Did you proceed in a northerly direction up until daylight? Were you constantly proceeding north up until daylight?

A. I was proceeding northwest by north until about daylight.

Q. When was daylight?

A. Daylight comes in in the morning then; you can see a little ways around six o'clock.

Q. You did not begin any searching for the barge until six o'clock, did you?

A. We had a lookout, but I didn't expect to see her. I didn't want to see her that night, because at night I would collide with her; she was heavy enough to break something on my vessel. There was no light on the barge, and it was a dark night, and it was not safe for me to come in contact with the barge with a strong wind and a sea; it was not safe for me.

Q. What did you do in the daylight?

A. I ran in the night more than the distance from when we lost the barge, and I turned around on a

(Testimony of Hans Michaelsen.)

slow bell and ran to the south and southeasterly and kept looking around. I changed my course in for a little while, and then I steered out a little while and tried to see if I could pick it up. There was a kind of a drifting fog. At times it was a little clear and I could see perhaps a couple of miles and then it would shut down again and you could not see anywhere.

Q. In your report to the collector of customs, you say the fog lifted and you continued to search for the barge until eleven A. M. the same day.

A. That is correct; at eight A. M. [129—57] the fog lifted, and it lifted for perhaps half an hour. It was a drift fog. Then it set in foggy again. When the fog lifted I saw the steamer; I thought it was the "Watson"; I could not see her ahead of me, it was then foggy; it took her about fifteen minutes to come from a mile ahead or a mile and a half ahead until she got about a mile and a half astern. I could not see her a mile ahead on account of the fog. After she passed me about two miles or so I saw her, and I saw her for about five minutes, then it set in again. There was a drift fog that generally runs with a northwester.

Q. I see the first note of any fog in this log is 9:10 A. M., and there is another note of it being foggy at 10:00 A. M., and clear at 11:15 A. M.

A. It was a drift fog; it is foggy and it is clearing; that is what a drift fog is. Fog banks come with a northwest wind. At times it is pretty clear and

(Testimony of Hans Michaelsen.)

you can see a little ways and at other times it sets in foggy again.

Q. Did it begin to clear at 11:15 A. M. as noted in the log?

A. At 11:15 A. M. it was clearing, that is, you could not call it clear, but it is what we would call clear enough that we did not have to blow our steam whistle.

Q. It was cleared up?

A. It was clear enough so that we did not have to blow our steam whistle. We could see for a mile or two around us.

Q. That was the very time you started back to San Francisco was it not? A. That was the very time.

Q. Suppose when it was foggy you hove to and waited, you could have saved fuel oil in that way, could you not?

A. Well, I could not lay on the ocean with a north-west sea and wind without using my engine. [130—58]

Q. You could have gone very slowly.

A. I would not do it as master of a vessel. First of all, with a loaded vessel, she will go sideways, and I will either lose my housing or my deck-load. The only way of holding the vessel is either to hold her before it, or put the bow on the sea. That is according to my experience. I have had experience since I was thirteen years old. I never saw anybody stop a vessel on the ocean with a sea and wind.

Q. You could have kept on very slowly?

(Testimony of Hans Michaelsen.)

A. I could have kept on very slow, but it takes fuel oil. At eleven o'clock I wanted to know from the chief engineer how much oil I had left. He told me he had about 60 barrels of oil.

Q. Captain, did you prepare the answers to the interrogatories in this case? I will withdraw that question. How much fuel oil do you ordinarily carry for your voyage from Coos Bay to San Francisco?

A. We carry between 260 and 280 barrels.

Q. How many barrels did you start out with on this trip?

A. I don't know exactly. I leave that to the chief. He is responsible for the oil proposition. He is supposed to notify me in time if he is in doubt about the oil. He is supposed to do that. I don't recollect exactly what we had on that date. The chief can tell you what we had when we started.

Q. And you consider it prudent to have been 260 and 290 barrels?

A. Between 260 and 280 barrels.

Q. And you use up about 42 barrels a day?

A. More or less. It depends whether we are steaming. Sometimes it takes me seventy-two hours to come from Coos Bay, and sometimes I come in forty hours, depending on how I strike the weather.

Q. You cannot count on making the voyage in the same time all the time, can you?

A. No, and I cannot count on using the same amount of oil all the time. You don't know what time [131—59] you are up against the high wind. I have always to be on the safe side.

(Testimony of Hans Michaelsen.)

Q. Before you started on this voyage, did you ask the engineer how much fuel oil there was on board?

A. I never ask him about it. He goes to the oil dock and gets the fuel oil in the tank.

Q. You leave that entirely to him?

A. The filling of the oil tank I leave to the chief engineer. Lots of times I am around, but he signs the bill.

Q. You say the first report you got after you went to bed that night was at twelve o'clock?

A. Yes, sir.

Q. And that was to the effect that everything was fine? A. Everything was all right.

Q. And your next report was at 12:40, that the tow was lost?

A. At 12:40 they reported to me it was lost.

Q. When you sighted the "Watson," where was she?

A. The "Watson" was, I should judge, according to my judgment, a good mile inside me, and she passed me about two miles when I discovered her again.

Q. What time did she pass you?

A. I think, as near as I could tell it was close to 8:30.

Q. About 8:30?

A. Yes, as near as I can remember, to my best ability.

Q. Where, in your opinion, under a fresh north-west wind, such as there was, would the barge drift?

(Testimony of Hans Michaelsen.)

A. In my opinion, the barge would drift in toward shore, making south. I figured the barge would be drifting about southeast by east, or something like that. I would figure she was drifting about southeast by east, or something like that. I would figure she was drifting about southeast by east. Sometimes the currents affect it one way or the other. Of course, I could not exactly figure it.

Q. Captain, who keeps the official log?

A. The chief officer. [132—60]

Q. Is not this official log simply copied from the pilot-house log? A. Yes, sir.

Q. And the entries in the pilot-house log would be the same as in the official log; they are copied later into the official log?

A. The pilot-house log is copied into the official log.

Q. Now, Captain, I wish you would tell me more definitely when you made this erasure which appears on September 7th?

A. You say you want the correct time when I erased this?

Q. Yes. A. I cannot give it to you.

Q. Wasn't it when the voyage was all over?

A. No, it was on the way down, if I remember right. To my best knowledge, it was on the way down.

Q. When is the official log written up?

A. The official log is supposed to be written up by the first mate.

Q. At what time?

(Testimony of Hans Michaelsen.)

A. At any time during the day. There is no regular time.

Q. I see in the official log the entry reads: "12:40 A. M. discovered hawser on barge parted, tow loose."

A. Well, as I say, at 12:40 the tow-line parted.

Q. "1:00 A. M. hove to; engines working dead slow."

A. Well, I told you it took us about fifteen minutes to get the line in—well, now, I am not much out on that. Here it is at 12:40, and we hove to at one o'clock. That is twenty minutes. Twenty minutes from the time we discovered it was lost the hawser was in and the vessel was hove to.

Q. That is not what I am trying to get at. If you made the correction as soon as you state you did, why wasn't the correction copied into the official log?

A. That I could not tell you. He wrote it on his way down there, or maybe that very day he went on his watch below, he wrote that in, but I was up on the [133—61] bridge and I said, "Why didn't he enter this hove to, and I may have taken my pencil and wrote it in there; he is there, and if he objects to it or if I write any different he would know it. I have the right to correct the log-book, you know.

Mr. FRANK.—So that the Court can understand the purport of this examination, I desire to read the two entries so that your Honor can see what if any changes were made:

"12:40 discovered tow-line parted; ship was at one o'clock hove to. Engines working dead slow."

The entry in the official log is:

(Testimony of Hans Michaelsen.)

“12:40 discovered hawser on barge parted, tow loose; I hove to, engines working dead slow.”

Mr. DERBY.—I want to know what was in the pilot-house log before the captain made that change. He said he made the change before this was entered up.

Mr. FRANK.—Well, ask him.

Mr. DERBY.—I have asked him. I am satisfied. I should like to offer the log-book in evidence, if it can be spared, the full log.

Mr. FRANK.—Certainly. We will if you do not.

Mr. DERBY.—I ask that it be marked “Libellant’s Exhibit C.” That is all.

Redirect Examination.

Mr. FRANK.—Q. Now, with reference to this log-book, I wish to read from it, if your Honor please. The contention is made the entry was made in the log-book “Moderate sea” for the first three entries. These are the entries.

“6:15 P. M. crossed the bar, moderate. Light on barge went out in crossing the bar. Wind and sea prevented us from lighting it again. Fresh north-west, clear, moderate sea.” [134—62] The entries at the hours which indicate crossing the bar, moderate.

“6:45 C. C.,” meaning change of course.

“8 “ “ meaning change of course.”

Mr. DERBY.—Under the words “moderate sea” the ditto marks appear. The Court can examine it.

Mr. FRANK.—Yes, the Court can examine it it-

(Testimony of Hans Michaelson.)

self to see what is there. Also on September 7th, with reference to the fog, the entries which I wish to call attention to are as follows.

“4: wind moderate, hazy.

“7:25, wind moderate, hazy.

“9:10: Fresh wind, foggy.

“10: Fresh northwest, foggy.

“11:15 clearing.”

That is all, Captain.

[**Testimony of A. Hultgreen, for Respondent.**]

A. HULTGREEN, called for Respondent, sworn.

Mr. FRANK.—Q. What is your name, please?

A. A. Hultgreen.

Q. You were mate on board the “Hardy” at the time now in question? A. Yes, sir.

Q. How long have you been going to sea? ..

A. 21 years.

Q. How long have you been an officer?

A. Three years and three months.

Q. That is, you mean a first officer?

A. I was just taking the place of the first officer; he was off that trip, and I took his place.

Q. Three years and three months is your experience as an officer? A. Yes, sir.

Q. Were you on watch as the vessel went down Coos Bay toward [135—63] the bar?

A. No, it was my watch below.

Q. Were you on deck?

A. I was on deck part of the time.

Q. Were you on deck when you crossed the bar?

(Testimony of A. Hultgreen.)

A. Yes, sir.

Q. Did you notice the barge going over the bar?

A. Yes, sir.

Q. Did you notice when the light went out?

A. I noticed the light went out in passing over the outer edge of the bar, with a kind of a heavy westerly swell coming in, she was jumping heavy and the light went out then.

Q. How long did you remain on deck after that?

A. I was on deck until twelve o'clock.

Q. What was your watch, from six to twelve?

A. From six to twelve, yes, sir.

Q. So you were on watch when the light went out? A. Yes, sir.

Q. What can you say with regard to the reasonableness of an attempt to have gone out to relight that light that night?

A. In my opinion, it was pretty near impossible to board that barge at any stage from the time we went over that bar until we lost her, and it would have been a needless risk of life and a needless risk of getting a boat swamped to get anywhere near her the way the barge was working in the sea; she would lift up and show half her bottom above the water, and she would jump down again and she would go from one sea to the other, and as the sea increased, she would jump from sea to sea; every sea she would make a jump.

Q. You say the wind and sea increased; what do you mean, from what time to what time?

(Testimony of A. Hultgreen.)

A. After we crossed the bar, we had a westerly swell coming in toward the bar, and as soon as we got clear of the bell buoy and shaped our course toward the southard, we caught the wind, a strong north-west wind.

Q. And it kept on increasing during the night?
[136—64] A. Yes, sir.

Q. How about the following day?

A. Well, it was strong the whole day. It was strong all the way down, and in the afternoon before we lost the barge, it increased a good deal, as it most always does near Cape Mendocino and Point Gorda; with northwest weather there is almost always a stronger breeze blowing a few miles to the northward and a few miles to the southward of those points.

Q. Were you on watch at the time the barge was lost?
A. Yes, sir.

Q. How many men were on watch, or who was on watch; what watch was there?

A. There was the regular watch, a man at the wheel and a man at the lookout, and one man specially looking out for the barge.

Q. Where was he stationed?

A. He was stationed aft.

Q. Where? A. On the poop.

Q. Does her poop run up to the stern?

A. The poop is right aft the afterdeck. My position up on the bridge is above it, on top of the house, where I have a view right astern and all around.

(Testimony of A. Hultgreen.)

Q. I understand that, but what I want to get at is, her poop is aft, and it runs up flush with the stern of the vessel, does it?

A. Yes, sir; there is just a rail around the stern.

Q. The line of the tow came up over the poop, did it not?

A. Yes, sir; and made fast to the bitt.

Q. And on that poop is where the man was watching the tow? A. Yes, sir.

Q. And your position was on the bridge?

A. Yes, sir.

Q. And you could see the tow from the bridge, also?

A. I had a clear view, I could see the tow from the bridge.

Q. What could you see of the tow during the night, to ascertain [137—65] whether she was there or not?

A. When I came up at twelve o'clock, it was a very dark and cloudy night, but otherwise seemed to be pretty clear, but it was very dark, but you could plainly see the milk-white foam, and the forepart of the barge was riding over the sea; you could also see by the hawser. I relieved the second officer, and made myself sure that the barge was there.

Q. Previously to the loss of the barge, what, if anything, did you do about going down and examining the tow-line?

A. About twenty minutes past twelve I went down and had a look at the chock where the line went

(Testimony of A. Hultgreen.)

through to see that the chafing-gear was all right, and at that time I plainly saw the barge astern. I went up on the bridge again, and I was walking up and down there looking ahead, and once in a while—once every minute or so—looking astern, taking a view all around, as we have to do, having charge of a ship on the watch, and at about twenty-five minutes to one, as near as I can recollect it was, I looked and I did not see the foam, I could not see the foam there; I thought perhaps it had run to the side, and the foam was ahead for a little while; sometimes it would take a shear on the sea and you could not see the foam so plain. So I was looking very sharp for the barge for a minute or so, and I sung out to the man who was stationed there to look out for the barge, “Can you see the light—I mean, can you see the barge?” He said, “No.” I took the glasses and I looked through the glasses, and I didn’t see no sign of her, and so I called the master right then and there. As soon as the master was called, I called the watch on deck, and they came aft and we started to heave in the hawser, and we took the hawser through the capstan. Meanwhile the captain was up and the ship was stopped. As soon [138—66] as the hawser was in, I went up to the bridge to the captain and reported the hawser in, and he ordered the helm hard aport and we hove her to.

Q. After that, what did you do? Go on and tell the story of what you did to try to pick her up, and what you saw?

(Testimony of A. Hultgreen.)

A. We were laying hove to then, working the engines so as to keep steerage way on the ship.

Q. What direction was the wind and the set?

A. The wind and sea was northwest.

Q. That was a following sea?

A. It was a following sea when we were towing, following wind and sea. We were hove to, and in the morning when I came on deck after breakfast—my watch below was from four to eight, and when I came on deck, the ship was heading south again. Then when I came on deck it was hazy, half foggy; it was what you would enter as hazy, with drifting fog once in a while. After I had been on the bridge for a while, I guess about half past eight or so, it kind of cleared up a little while, and we saw a steamer on our port bow that we made out to be the “Watson” or the “Buckman,” we could not say which of the two, because they are alike, but we could see it was one of the two, it was on our port quarter, about a mile or a little more; it had just passed us; we just saw her for a couple of minutes and she disappeared in the fog again. We continued on our course. We kept a point more in and then changed the course out a point or so, so as to kind of go a little to either side.

Q. You mean you zig-zagged?

A. Yes, sir, and then a little while afterwards, about nine o'clock, it set in real foggy, and we could not see very far then.

Q. What means did you take to search the sea,

(Testimony of A. Hultgreen.)

to look out to [139—67] see if you could find the barge?

A. We were all looking out from all parts of the ship, everybody on board the ship was looking for the barge, up in the rigging several times; the captain was up with the glasses in the rigging when the fog lifted for a little spell. We were all very busy looking for the barge that forenoon.

Q. Were you present up in Coos Bay when the captain and Mr. Banks talked these matters over?

A. No, sir.

Q. Were you present in San Francisco when Mr. Rosenthal and Mr. Davenport came down?

A. I was present, but I did not hear any of their conversation. I was standing on one side after on the deck where the hawser was coiled up, and the captain and those gentlemen were standing on the other side, conversing there, but I did not hear any of their conversation. The only thing, when they were through, they walked over toward the hawser and were looking at the hawser, and I remember picking it up and taking it in my hands and showing the strands of it; I was trying to break it between my hands, but I could not.

Q. That is, you mean the thread of the hawser?

A. Yes, sir.

Cross-examination.

Mr. DERBY.—Q. What time did you leave Coos Bay? A. Five o'clock.

Q. What time did you cross the bar?

(Testimony of A. Hultgreen.)

A. We were across the bar at 6:15.

Q. What time does the "Hardy" usually take to cross the bar?

A. It all depends; at this time it commenced to ebb very fast as we went over. It was ebbing all the time from the time we left the dock down to the bar, and in that case she goes very fast. There would be quite a difference between when you got out with the flood tide, that is, the tide against you. [140—68]

Q. That is, the tide was ebbing all the time you were going up there?

A. Yes, sir; that is, slack water part of the way.

Q. Was the sea moderate during that first night, September 5th?

A. Well, it was what we call moderate. The sea may be pretty big, but we will still call it moderate. We don't usually call it a heavy sea unless it is accompanied with a gale, or else a heavy swell setting in with moderate wind.

Q. You say you were on watch at the time the barge was lost? A. Yes, sir.

Q. And a man at the wheel? A. Yes, sir.

Q. And one lookout? A. Yes, sir.

Q. Where was the general lookout?

A. There was one forward and there was one special aft.

Q. There was one lookout at the aft, looking after the barge?

A. Yes, sir; that man was specially to look out for

(Testimony of A. Hultgreen.)

the barge, on account of her having no light.

Q. How did you happen to go down at 12:20 to look at the barge yourself?

A. I relieved the second officer at 12 o'clock, and of course, I came on deck just then. We are called at ten minutes to twelve. By the time I got my clothes on and got up to relieve him, I just went up and relieved him and then I went and took a run down to look at the hawser to see that everything is all right. When I am in charge of the ship I am in charge of the tow, too, and everything connected with it, and I have to see that everything is all right.

Q. You saw it was all right, because you could see the foam coming up against the side of the barge?

A. I could see the barge myself, I could see that it was there. I went down to see that the chafing-gear was all right, and seeing that it would not chafe and be damaged where it led into the rail. I had a clear view [141—69] from the bridge all around the horizon, and I could see the barge at any time from my station.

Q. How far do you think you could see that night?

A. That is pretty hard to judge. I did not see no light. At twelve o'clock, or at the time I came on deck, I may have been able to see—well, I would not judge, because it is pretty hard to judge. When it is that dark, you don't know when you see a light how far you really can see. It may be kind of hazy, and the dark prevents you seeing, whether it is hazy or clear. If the stars are all out, you can see the horizon, but if it is cloudy and hazy the stars and the

(Testimony of A. Hultgreen.)

horizon seem to melt together, you cannot tell whether it is a light haze or whether it is perfectly clear.

Q. I see that at the time the line parted, you have an entry in your log that the weather was clear?

A. Yes.

Q. Is that correct? A. Yes, sir.

Q. And also that there was a moderate sea?

A. That is correct, too, so far as we are use to making the entries along the coast there.

Q. After you discovered the loss of the barge, you immediately notified the captain, did you?

A. Yes, sir.

Q. What did the captain do when he came up on deck?

A. The captain came right up on deck. When I called him, he said to me to call the watch and get the hawser in. I had the watch called and the captain came on deck immediately, and as soon as the captain came up I went down to make arrangements to get the hawser in, take it through the capstan and heave it in. As soon as the captain came on deck I went down below, and I heard the bell given to stop the engine.

Q. How long did it take you to get in the hawser?

A. It took [142—70] about fifteen minutes, I guess, or something like that; I did not exactly count it up.

Q. Did it take as long as that?

A. Yes, I guess so, from the time we started in to get together and get the turns of the bitt. When you

(Testimony of A. Hultgreen.)

have a hawser well made fast, you have all kinds of turns around the bitt, and you have to take that all off and the turns, and then lead it to the capstan. The capstan works very slowly.

Q. What time did it begin to get foggy on September 7th, the day the barge was lost?

A. I could not tell what time it did commence to get foggy; it commenced to get real foggy about nine o'clock in the morning, what we call real foggy when we commence to blow the foghorn.

Q. When did it clear up?

A. It cleared up around eleven o'clock, or somewhere around there.

Q. What time did you start for San Francisco?

A. We started for San Francisco at 11:15. We started to San Francisco in the morning, in the direction of San Francisco, just after daylight, and we started off full speed at 11:15. I heard the captain talking about it, that there was no use to risk going north any more and then coming south again, because he would not have enough fuel oil to bring us in.

Q. You remember Mr. Rosenthal and Mr. Davenport coming down on the day of the "Hardy's" arrival and talking with the captain?

A. Yes, I remember that; I was just telling you I was showing them the condition of the hawser.

Q. I understand you passed the "Watson" at about 8:30 and she was about a mile on your port bow?

(Testimony of A. Hultgreen.)

A. On our port quarter; she had already passed.
[143—71]

Q. Supposing you had sighted the barge that morning, what would you have done?

Mr. FRANK.—Just a minute. He is not in command of the ship. It is not for him to say what the captain would have done under the circumstances.

Mr. DERBY.—I submit that the question is proper, your Honor.

The COURT.—While that is probably true, it is a vague matter that does not throw any light on the question.

Mr. DERBY.—Very well, your Honor, that is all.

The COURT.—Q. How long was the barge lost before you missed her?

A. The barge could have been lost about a quarter of an hour at the most.

Q. Not more than that?

A. No, because I discovered her loss at twenty-five minutes to one, and twenty minutes after twelve I was down looking at the hawser and she was there, I am certain she was there; the barge could have been lost at any time between twenty minutes past twelve and twenty-five minutes to one, when I discovered it.

Q. How long was the line between the vessel and the barge?

A. I could not tell. We had pretty near the whole hawser out. I don't know the length of the hawser. There were just a few bites left for taking additional turns or making additional turns.

[**Testimony of K. Knudson, for Respondent.**]

K. KNUDSON, called for the Respondent, sworn.

Mr. FRANK.—Q. Mr. Knudson, you were chief engineer of the “Hardy” at the time of the loss of this barge? A. Yes, sir. [144—72]

Q. How long have you been running as the chief engineer of that vessel? A. Ten months now, sir.

Q. Were you present at the time that Mr. Rosenthal and Mr. Davenport came down to the ship and had the conversation they testified to with the captain? A. Yes, sir, they spoke to me first.

Q. What did they have to say to you?

A. They asked me for the captain and I told them that the captain was not on board.

Q. What passed then?

A. Then Mr. Rosenthal asked me something about the loss of the barge. How the conversation started I cannot very well recollect, but I remember he said to me “How was it you didn’t notice it on the main engine down below”? He thought it ought to go faster. And I explained to him how it was we did not notice it, the tow was easy, the wind and sea came along with us and we had no trouble at all, it didn’t make any difference to the speed. Then in the meantime the captain came and they turned around and spoke to the captain, and they were talking about the hawser and examined the line, and so forth. I didn’t pay much attention to the talk but they were still standing on the deck there.

Q. Did you hear the conversation related by Mr.

(Testimony of K. Knudson.)

Rosenthal between himself and the captain as to why the captain did not relight that light after it went out? A. Yes, sir.

Q. What was it?

A. The captain told him, the same as I did, that it was on account of the weather, that he would not risk no man's life on the boat.

Q. With respect to the fuel on that vessel, that is under your particular charge, is it not?

A. Yes, sir.

Q. Did you sound the tanks that morning after you had been [145—73] searching for the barge, to see what fuel you had on board? A. Yes, sir.

Q. What did you determine after you sounded the tanks?

A. I came to the conclusion I had about 60 barrels on board, as near as I could figure.

Q. With respect to its being sufficient to bring you in, or not, what do you say?

A. Well, I was figuring that I would not take the chances of running short of oil, or else I would be up against it.

Q. When you came in did you measure the tanks again? A. Yes, sir.

Q. What did you find?

A. In the neighborhood of 20 barrels.

Q. How many available barrels was that? Do you understand what I mean by available? How many barrels of the twenty could be used?

A. Well, from my experience steamboating there

(Testimony of K. Knudson.)

is no suction-pipe that goes right down to the bottom of the tank, you can always figure five or perhaps more barrels that you cannot suck out.

Q. So that the most you would have available would be about 15 barrels?

A. Yes, sir, something like that.

Q. What would you consider with regard to the safety of the vessel, as to the reasonableness of coming in or attempting to make port with a less surplus than that?

A. Well, I would not take the chances of having any less in case of a head wind and sea, I would want something to work on.

Q. You don't think it would be good seamanship to do that; is that the idea? A. That is the idea.

Q. You have two assistants, have you not?

A. One assistant.

Q. Are you up on deck at times observing the conditions on deck?

A. Yes, sir, very often. [146—74]

Q. Were you on deck during this voyage at any time, on the poop-deck, noticing the barge?

A. Yes, the same as usual; I go up every few minutes and stay up for awhile and then I go down again.

Q. What have you to say concerning the condition of the sea and the behaviour of the barge during the day preceding her loss?

A. Well, it was pretty rough; that is all I have to say. There was a pretty strong wind and a high sea going. That is the only thing I can say about

(Testimony of K. Knudson.)

the weather and the wind.

Q. You are not a navigator—you are only an engineer?

A. That is all, sir. It was pretty rough.

Q. How long have you been going to sea as an engineer? A. About 15 years.

Q. You know the difference then between what might be called a rough sea and a smooth sea, don't you? A. Yes, I do.

Cross-examination.

Mr. DERBY.—Q. Who asked the captain the question about why he did not relight his light?

A. Mr. Rosenthal and the two were together; who asked the question first I would not say but the two of them were talking to the captain, maybe at once; the two of them had something to say about it.

Q. What was the captain's reply to that?

A. He said the weather was in such a way that he would not risk no man's life in a boat.

Q. How many barrels of fuel-oil were there on board at the time you started the voyage?

A. Well, that I could not very well tell now. I sound the tanks before we leave, I sound the tanks for my own curiosity, to see that I am on the safe side to bring the vessel down.

Q. Don't you aim to have a certain amount of fuel-oil? [147—75]

A. Yes, and if I think I will run short I report to the captain; if I think there will be plenty I don't say nothing.

(Testimony of K. Knudson.)

Q. How much do you figure to have on a voyage down from Coos Bay to San Francisco, how much do you figure to have in your tanks?

A. Well, I would not go down with anything less than 130 or 140 barrels, not with anything less.

Q. Different voyages take different times, don't they?

A. Oh, sure; it all depends on the weather and wind.

Q. You always count on leaving with a considerable leeway as to the amount of oil you will take, do you not? A. Yes.

Q. And you knew on this voyage you were going to take down this tow?

A. Not leaving here I didn't; I knew it up there.

Q. If there had not been enough fuel-oil to take that tow down, you would have told the captain, would you not?

A. Oh, certainly, that is a sure thing.

Q. Were you in the engine-room at the time the tow broke loose?

A. I was on deck; I was sitting in my room and that is pretty near on deck.

Q. Was some other engineer on watch?

A. Yes, sir.

Q. Wouldn't there be a difference in the working of the engines if the tow was attached or the tow was not attached?

A. No, sir; well, it would make a difference when we come to see a revolution, we would make some-

(Testimony of K. Knudson.)

times a revolution more without the lighter than you would with the lighter but there would not be enough to feel it.

Q. Wouldn't you feel the shock of the tow breaking loose?

A. No, we didn't feel it down below, and I don't think anybody on deck felt it; we could not tell the difference on the engine without standing and listening to it. That is what Mr. [148—76] Rosenthal asked me.

Q. When was your next watch?

A. At 6 o'clock in the morning.

Q. Who was on watch from 12 to 6?

A. The first assistant.

Q. Is he here? A. No, sir.

Q. Where is he?

A. He is on board. By law it requires one engineer to be on board and he could not leave unless we stopped work.

Q. Whose rule is that?

A. The United States Inspectors.

Q. What is the "Hardy" doing now?

A. She is discharging.—

[**Testimony of Henry Preegen, for Respondent.**]

HENRY PREEGEN, called for the Respondent, sworn.

Mr. FRANK.—Q. You were one of the crew of the "Hardy," were you?

A. I was at that time, just on that trip.

Q. Where were you stationed?

(Testimony of Henry Preegen.)

A. I was aft on the poop-deck there.

Q. What were you doing?

A. Just stationed there specially to watch out for the barge.

Q. How long had you been there?

A. From 6 to 12.

Q. From 6 to 12? A. That night, yes.

Q. And at 12 o'clock were you relieved?

A. I was relieved at 12 o'clock.

Q. Who relieved you.

A. Well, Joe—I don't know his last name; he was a sailor; I don't know his last name.

Q. He is not on the "Hardy" now?

A. No, I don't think he is.

Q. During the time you were watching the barge, how did you tell she was there?

A. By the foam and then every once in awhile you would get a glimpse of it. You can kind of see the form of it riding up and down, you could see the form of [149—77] the vessel and the way she was riding she would naturally throw some foam.

Q. What was the condition of the sea?

A. It was a very high sea and a very strong north-west wind. High seas were running.

Q. How was it after the barge was lost?

A. It was kind of high; the high seas seemed to continue. It kind of calmed down later in the day, towards 12 o'clock or so.

Q. You were then on your way home?

A. We were then on our way home, we just started.

(Testimony of Henry Preegen.)

Mr. FRANK.—Take the witness.

Mr. DERBY.—No cross-examination.

The COURT.—Q. You did not see whether or not the barge was there when you went off watch?

A. It was there, yes, sir.

[Testimony of Rudolph Sanne, for Respondent.]

RUDOLPH SANNE, called for Respondent, sworn.

Mr. FRANK.—Q. You were a sailor on the “Hardy” at the time of this accident, were you?

A. Yes, sir.

Q. How long have you been going to sea?

A. About nine years.

Q. At the time of the accident where were you stationed? A. I was right at the wheel.

Q. What was the condition of the weather?

A. It was pretty rough then.

Q. Were you on deck when the vessel passed over the Coos Bay bar?

A. Yes, sir, I was at the wheel helping. Two men were at the wheel; I was at the lee wheel; I was helping the man at the wheel.

Q. When did the light go out?

A. Of course, I could not see because I was at the wheel, but they said it was going over the [150—78] bar. I could not see it.

Q. After you passed over the bar, having in view the condition of the weather and the time of the day, what would be your judgment as to the reasonableness or safety of putting off a boat in order to relight that light?

(Testimony of Rudolph Sanne.)

A. Well, of course, as long as we were on the bar we could not put off a boat because it was too rough and breaking too much, and when we got outside in safety for the vessel, far enough off shore so that the captain could stop without drifting ashore, it was getting dark, and when it was dark a fellow could not very well climb on board the barge then.

Q. What was the condition of the sea at that time?

A. Pretty big swells.

Q. What was the condition of the sea from that time on up to the time the barge was lost?

A. The next day it was still rough, blowing pretty good in the morning. We had a watch on deck in the morning, from 8 to 12—we had a watch below, and in fact I had a watch on deck again, and I was working aft, and I was looking at the barge, and she was more than tossing around there and it was impossible to get a boat alongside the barge at that time.

Q. You were down below from what time do you say? A. From 8 to 12 in the morning.

Q. So you don't know anything about the conditions at that time?

A. No, but it was blowing in the morning, and it was blowing when I came on deck again at 12 o'clock, so it must have been blowing all the time.

Cross-examination.

Mr. DERBY.—Q. You say it was getting dark when you were going across the bar?

A. Yes, sir, when we got far enough [151—79] out to sea.

(Testimony of Rudolph Sanne.)

Q. The sea was fairly moderate?

A. Well, there was a big swell.

Q. If it had not been for the darkness the sea alone would have prevented putting down a boat, would it?

A. Well, I guess you could have managed then all right but when it was dark and at the same time a big sea it would have been impossible.

Q. You say the next day it got rougher?

A. Yes, sir, and it was blowing like anything too.

Q. Did the water come aboard the barge?

A. No, I think she kept on top of the water, but the way she was tossing around you couldn't get near her.

Q. Wouldn't the waves wash over her?

A. No, I don't think so, as far as I remember; it got so high that she was just about clear of the water sometimes.

Q. She went through this tremendously rough weather without getting the slightest water on board?

A. I would not say as to that. She was light. If she had a load on her the water would shoot all over her, but she was so light she was just like a feather and she just kept on top of the water all the time.

Mr. FRANK.—That is the case, your Honor.

[Testimony of Robert Banks (Recalled in Rebuttal).]

ROBERT BANKS, recalled in rebuttal:

Mr. DERBY.—Q. Mr. Banks, when did you come

(Testimony of Robert Banks.)

down this last time? A. Sunday morning.

Q. Did you sail down?

A. Yes, sir, I came down on the steamer "Speedwell." [152—80]

Q. Did any other steamer come down at about the same time?

A. The steamer "Hardy" and the "A. M. Simpson" came out ahead of us, about half an hour ahead of us.

Q. Do you know how long the "Speedwell" and the "Hardy" took to get from Coos Bay to the bar?

Mr. FRANK.—I submit that that is immaterial.

Mr. DERBY.—I am endeavoring to show that this light went out before the ship crossed the Coos Bay bar, and that it would have been perfectly possible in the harbor to have let down a boat. I want to show that the usual time for crossing the bar is about an hour and 45 minutes and that ships cannot go out of there in less than that, because of the dangerous shoals. While the evidence may not be of any great weight, I submit it is certainly admissible.

The COURT.—Do you mean as fixing the time when the light went out? They have fixed it by the place.

Mr. DERBY.—They have fixed a time also; they have fixed the time as 6:15.

The COURT.—They have figured the place definitely as the outer edge of the bar. That is a definite place.

Mr. DERBY.—Of course, if your Honor has de-

(Testimony of Robert Banks.)

cided to accept that statement, I suppose that ends it.

The COURT.—I don't say that that could not be contradicted, but I do not think that testimony as to how long it takes to go down the bay would contradict it.

Mr. DERBY.—We put interrogatories as to the time when the light went out and in answer to those interrogatories they say the light went out at 6:15. We are prepared to show that the "Hardy" could not have crossed the bar as soon as that.

The COURT.—If you have definite testimony as to the time, [153—81] 6:15, I will take that testimony.

Mr. DERBY.—I would not say, your Honor, that I have definite testimony as to that time.

The COURT.—There was some testimony given here about 6:15, but that was given in connection with a place, as being the outer edge of the bar, when the light went out.

Mr. DERBY.—The point I am trying to make is that taking the time when she started she could not have got outside the bar within that short time.

The COURT.—Suppose I say I met you at a fixed place that both of us know; we could not be mistaken as to the place, but we might be mistaken as to the time. That is all I am trying to state. A place is a thing we all know and the time is a thing we are all guessing at unless we make a note of it. For that reason, if you fix a definite place you fix a more definite thing than an indefinite time.

(Testimony of Robert Banks.)

Mr. DERBY.—Of course, the place is fixed by interested witnesses and we have no means of contradicting it.

The COURT.—I understand that, and so far as that is concerned if they were fixing a time to estimate a certain thing—I do not say that they would that in this case, but according to your idea if they were fixing a time they would probably fix it late enough.

Mr. DERBY.—Q. How long did it take that night for those two vessels to come out?

A. The night that I came out?

Q. Yes.

A. We left North Bend at a quarter past 2—I did on the “Speedwell”; at 4 o’clock we were outside the bar.

Q. How about the “Hardy”?

A. The “Hardy” was ahead of us about the same distance, practically the same distance as she was when she left. They figured the “Speedwell’s” time about [154—82] an hour and three-quarters from the time we left the dock until we were out to the buoy.

Q. Are you familiar with Coos Bay?

A. Fairly, yes, sir.

Q. Is it a dangerous location? Is there any difficulty in getting out of the channel?

A. No, there is no difficulty in getting out. Of course, if the vessel is loaded they have to take the high tide on account of the shoals at certain places.

Q. What I mean is, do vessels proceed as fast be-

(Testimony of Robert Banks.)

fore they get outside as they do after they get outside? A. As a rule they do not.

Q. After this loss of the barge on the "Hardy," did you come on the "Iaqua" when the second barge was towed down? A. Yes, sir.

Q. How was the weather on that voyage?

Mr. FRANK.—What is the purpose of this?

Mr. DERBY.—I propose to show that on this voyage of the "Iaqua" there was an exceedingly rough sea and a strong northwest wind, that the barge broke adrift, and that the "Iaqua" had not the slightest difficulty in letting down a boat and getting their men aboard the barge and picking the barge up.

Mr. FRANK.—I do not see how that applies to this case. We would have to try all the details of that matter. And then if they had another one, we would have to try all the details of that other one. It would be interminable.

The COURT.—That is the trouble, we would have to try the storms and the sea and the winds surrounding the second barge.

Mr. DERBY.—These witnesses have testified that in a strong northwest wind it is exceedingly dangerous to put down a boat and get aboard a barge. We want to show that it was done in another case almost exactly similar. [155—83]

Mr. FRANK.—Well, we will have to find out if it was exactly similar. In a matter of this sort, where it is a matter of discretion and judgment on the part

of the master, where he is using ordinary diligence in the matter his judgment is conclusive on that point.

The COURT.—The objection will be sustained.

Mr. DERBY.—Q. You heard Captain Michael-
sen's testimony in regard to his statement that he
would take no risks in this tow? A. Yes, sir.

Q. Was any such statement made to you?

A. No, sir.

Mr. DERBY.—That is all.

Mr. FRANK.—That is all.

Mr. DERBY.—That is our case.

(Thereupon the cause was submitted on briefs to
be filed in 10, 20 and 5.)

[Endorsed]: Filed Jun. 9, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [156—
84]

[Minutes of Hearing—June 2, 1914.]

At a stated term of the District Court of the United
States of America, for the Northern District of
California, First Division, held at the courtroom
thereof, in the City and County of San Fran-
cisco, on Tuesday, the 2d day of June, in the
year of our Lord, one thousand nine hundred
and fourteen. Present: The Honorable M. T.
DOOLING, Judge.

No. 15,484.

K. V. KRUSE & R. BANKS, etc.,

vs.

THE AM. STEAMER "HARDY," etc.

This cause this day came on regularly for hearing. S. H. Derby, Esq., appeared as Proctor for Libelants and N. H. Frank, Esq., as Proctor for Respondent. Mr. Derby stated the case of the libelants and introduced in evidence the deposition of O. P. Brit et al., and the deposition of Richard C. Brennam, together with a chart which was filed and marked Libelants' Exhibit "A." Mr. Derby then called Henry C. Peterson, Robert Banks, Louis Rosenthal, J. E. Davenport and A. F. Pillsbury, who were each duly sworn and examined on behalf of the libelants. Mr. Derby also introduced in evidence a certain chart which was filed and marked Libelant's Exhibit "B," and a certain log-book which was marked Libelant's Exhibit "C," but which was withheld by Mr. Frank and was not filed, at the request of Mr. Frank and with the consent of Mr. Derby. Thereupon, Mr. Derby rested the case for the libelants. Mr. Frank introduced in evidence the depositions of L. F. Falkenstein and Edgar N. Simpson, on behalf of the respondent, and called A. Hultgren, K. Knudson, Henry Peggen and Rudolph Sanne, who were each duly sworn and examined on behalf of respondent. Thereupon, Mr. Frank rested the defense of the respondent. Mr. Derby then recalled Robert Banks on behalf of the libelants. The case was then submitted

to the Court on Briefs to be filed in 10, 20 and 5 days. [157]

[Minutes, March 5, 1915, as to Filing of Opinion, etc.]

At a stated term of the District Court of the United States of America, for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco on Friday, the 5th day of March, in the year of our Lord, one thousand nine hundred and fifteen. Present: The Honorable M. T. DOOLING, Judge.

No. 15,484.

K. V. KRUSE and R. BANKS, Copartners, etc.,

vs.

The Am. Stmr. "HARDY," etc.

In this cause the Court this day filed Opinion, and ordered that a Decree be entered herein in favor of Respondent. [158]

[Conclusions and Order That Decree be Entered in Favor of Respondent.]

[Title of Court and Cause.]

(OPINION AND ORDER TO ENTER DECREE IN FAVOR OF RESPONDENT.)

McCLANAHAN & DERBY, Proctors for Libelants.

NATHAN H. FRANK, Esq., and IRVING H. FRANK, Esq., Proctors for Claimants.

In this case my conclusions are as follows:

1. That libelants furnished the hawser to the steamer "Hardy" for the purpose of towing their barge to San Francisco, and that the "Hardy" was not responsible for the parting of such hawser, which was the real cause of the loss of the barge;

2. That it was for the captain of the "Hardy" to determine whether or not light on the barge could have been relighted without danger of losing his men in the attempt, and the evidence shows that the possibility of such danger was so great that the Court will not review the action of the captain in that regard.

3. The loss of the barge under all the circumstances was discovered as seasonably as could reasonably be expected. [159]

4. The "Hardy" was not negligent in failing to keep up a longer search for the barge.

For these reasons a decree will be entered in favor of respondent.

March 5th, 1915.

M. T. DOOLING,

Judge.

[Endorsed]: Filed Mar. 5, 1915. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [160]

*In the District Court of the United States, for the
Northern District of California, Division One.*

No. 15,484.

K. V. KRUSE and R. BANKS, Copartners Doing
Business Under the Firm Name of KRUSE &
BANKS SHIPBUILDING COMPANY, on
Behalf of Themselves and Their Under-
writers,

Libelants,

vs.

The American Steamer "HARDY," Her Tackle, Ap-
parel and Furniture,

Libelee,

M. J. SAVAGE, EDW. J. MORSER, JAMES H.
HARDY, INC., JAMES H. HARDY, HANS
MICHAELSON, Mrs. F. RULFS and Dr.
ALEXANDER WARNER,

Claimants.

Final Decree.

The above cause having come duly on to be heard
on the pleadings and proofs of the respective parties
and the same having been argued and submitted, and
an opinion having been filed on the 5th day of March,
1915, in favor of the libelee and claimants herein.

NOW, THEREFORE, on motion of W. S.
Andrews, proctor for the claimants,

IT IS HEREBY ORDERED, ADJUDGED AND
DECREED, that the libel herein be and the same

hereby is dismissed, with costs to the claimants.

Dated San Francisco, June 7, 1915.

M. T. DOOLING,

Judge.

[Endorsed]: Filed Jun. 7, 1915. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [161]

[Title of Court and Cause.]

Notice of Appeal.

To M. J. Savage, Edw. J. Morser, James H. Hardy,
Inc., James H. Hardy, Hans Michelson, Mrs.
F. Rulfs and Dr. Alexander Warner, Claimants
in the Above Cause, and to W. S. Andrew, Esq.,
Their Proctor.

You and each of you are hereby notified that K. V.
Kruse and R. Banks, copartners doing business
under the firm name of Kruse & Banks Shipbuilding
Company, on behalf of themselves and their under-
writers, libelants above named, do hereby appeal to
the United States Circuit Court of Appeals for the
Ninth Circuit from the final decree of the above-en-
titled court made and filed in the above-entitled cause
on June 7th, 1915, dismissing the libel herein with
costs.

Dated San Francisco, June 14th, 1915.

McCLANAHAN & DERBY,

Proctors for K. V. Kruse and R. Banks, Copartners,
etc., Libelants. [162]

Receipt of a copy of the within Notice is hereby admitted this 14th day of June, 1915,

W. S. ANDREWS,
Proctor for Claimants.

[Endorsed]: Filed Jun. 15, 1915. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [163]

[Title of Court and Cause.]

Assignment of Errors.

Now come K. V. Kruse and R. Banks, copartners doing business under the firm name of Kruse & Banks Shipbuilding Company, libelants and appellants herein, and say that in the record, opinion, final decree and proceedings in the above cause there is manifest and material error, and said appellants now make, file and present the following assignment of errors on which they rely, to wit:

I.

That the Court erred in holding and deciding that the libelants furnished the hawser to the steamer "Hardy" for the purpose of towing their barge to San Francisco, and that the "Hardy" was not responsible for the parting of such hawser; and in not holding and deciding that the master of the "Hardy" himself furnished said hawser and in not holding the "Hardy" [164] responsible for the parting thereof.

II.

That the Court erred in holding and deciding that the parting of said hawser was the real cause of the loss of said barge.

III.

That the Court erred in holding and deciding that the possibility of danger in relighting the light on the barge was so great that it would not review the action of the master of the “Hardy” in not relighting the same, and in not holding and deciding that the “Hardy” was negligent in not relighting said light and that such negligence was one of the proximate causes of the loss of libelant’s barge.

IV.

That the Court erred in holding and deciding that the loss of the barge was discovered by those on board the “Hardy” as seasonably as could reasonably be expected, and in not holding and deciding that the “Hardy” was negligent in not sooner discovering the loss of said barge and that such negligence was one of the proximate causes of the loss of said barge.

V.

That the Court erred in holding and deciding that the “Hardy” was not negligent in failing to keep up a longer search for said barge, and in not holding and deciding that the “Hardy” was negligent in this respect, and was also negligent in making an absolutely insufficient search for said barge, and that said negligence was one of the proximate causes of the loss of said barge.

VI.

That the Court, in holding that the “Hardy” was not negligent in failing to keep up a longer search for said barge, [165] failed wholly to note that the “Hardy’s” only excuse in that respect was that she

had insufficient fuel oil to do so, and in not holding and deciding that such insufficiency rendered the "Hardy" unseaworthy for her voyage with said barge in tow, and hence rendered her liable for the loss of said barge.

VII.

That the Court erred in not holding and deciding upon the pleadings and the evidence that the "Hardy" was responsible to libelants for the losses suffered by them in the above cause.

VIII.

That the Court erred in making, rendering and entering a final decree herein dismissing the libel with costs, and in not making, rendering and entering an Interlocutory Decree in favor of Libelants referring the case to a Commissioner to ascertain the damages of libelants.

In order that the foregoing assignment of errors may be and appear of record said appellants file and present the same, and pray that such disposition be made thereof as is in accordance with law and the statutes of the United States in such cases made and provided, and said appellants pray a reversal of the decree herein and heretofore made and entered in the above-entitled cause and appealed from.

Dated San Francisco, Cal., June 21st, 1915.

McCLANAHAN & DERBY,

Proctors for Libelants and Appellants. [166]

Receipt of a copy of the within Assignment of Errors is hereby admitted this 21 day of June, 1915.

W. S. ANDREWS,
Proctor for Claimants.

[Endorsed]: Filed Jun. 22, 1915. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [167]

[Title of Court and Cause.]

**Stipulation and Order for Sending Up Original
Exhibits.**

Whereas, the original exhibits in the above-entitled cause (four in number) are of such a nature that it would be difficult and expensive to copy the same; now, therefore,

It is hereby stipulated and agreed that all of said original exhibits introduced in evidence in the above cause may be sent up to the United States Circuit Court of Appeals for the Ninth Circuit on the appeal herein as original exhibits and need not be copied.

Dated June 21st, 1915.

McCLANAHAN & DERBY,
Proctors for Appellants.
W. S. ANDREWS,
Proctor for Appellee, [172]

**Order [Directing That Original Exhibits be Sent to
Appellate Court, etc.].**

Pursuant to the foregoing stipulation, IT IS HEREBY ORDERED that the original exhibits introduced in evidence in the above cause may be sent up to the United States Circuit Court of Appeals for the Ninth Circuit as original exhibits and need not be copied.

Dated June 22, 1915.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Jun. 22, 1915. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [173]

**[Certificate of Clerk U. S. District Court to Apostles
on Appeal.]**

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing and hereunto annexed 174 pages numbered from 1 to 174, inclusive, with the accompanying exhibits, four in number (transmitted separately in their original form), contain a full, true, and correct transcript of the records and proceedings, as the same now remain on file and of record in the clerk's office of said District Court, in the cause entitled K. V. Kruse and R. Banks, copartners, etc., vs. The American Steamer "Hardy," etc., numbered 15,484, which said Apostles on Appeal are made up pursuant to and in accordance with "Praeceptum for Transcript on Appeal," copy of which is embodied herein, and the instructions of Messrs. McClanahan & Derby, Proctors for Libelants and Appellants herein.

I further certify that the cost of preparing and certifying the foregoing Apostles on Appeal is the sum of Seventy-one Dollars (\$71.00), and that the same has been paid to me by the proctors for appellants herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court,

this 29th day of June, A. D. 1915.

[Seal]

W. B. MALING,
Clerk.

By C. W. Calbreath,
Deputy Clerk.

[Ten Cent Internal Revenue Stamp. Canceled
June 29, 1915. C. W. C.] [175]

[Endorsed]: No. 2618. United States Circuit Court of Appeals for the Ninth Circuit. K. V. Kruse and R. Banks, Copartners Doing Business Under the Firm Name of Kruse & Banks Shipbuilding Company, a Corporation, on Behalf of Themselves and Their Underwriters, Appellants, vs. M. J. Savage, Edw. J. Morser, James H. Hardy, Inc., James H. Hardy, Hans Michelson, Mrs. F. Rulfs and Dr. Alexander Warner, Claimants of The American Steamer "Hardy," Her Tackle, Apparel and Furniture, Appellees. Apostles. Upon Appeal from the United States District Court for the Northern District of California, First Division.

Filed June 29, 1915.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

